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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

TEXACO INC., TEXACO PUERTO RICO, INC., MOBIL OIL CORPORATION, MOBIL OIL CARIBE, INC., EXXON CORPORATION and ESSO STANDARD OIL S.A., LTD.,
Petitioners,

v.

FEDERAL ENERGY ADMINISTRATION and FRANK G. ZARB, Administrator, Federal Energy Administration,
Respondents,

UNITED STATES OF AMERICA, COMMONWEALTH OIL REFINING COMPANY and COMMONWEALTH OF PUERTO RICO,
Intervenor-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

The petitioners, Mobil Oil Corporation, Mobil Oil Caribe, Inc., Exxon Corporation, Esso Standard Oil S.A., Ltd., Texaco Inc. and Texaco Puerto Rico, Inc., respectfully pray that a writ of certiorari issue to

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review the judgment and opinion of the Temporary Emergency Court of Appeals of the United States entered on February 9, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals, which is not yet reported officially, appears at 3 CCH Energy Mgmt. ¶ 26,037 (T.E.C.A. 1976), and the opinion of the District Court is reported at 398 F. Supp. 865 (D.D.C. 1975). Copies of these opinions appear in the Appendix.

JURISDICTION

The opinion of the Temporary Emergency Court of Appeals was entered on February 9, 1976. A timely petition for rehearing was denied on March 18, 1976. This Court's jurisdiction is invoked under Section 211(g) of the Economic Stabilization Act, as incorporated in Section 5(a)(1) of the Emergency Petroleum Allocation Act, 15 U.S.C. § 754(a)(1).

QUESTIONS PRESENTED

1. Whether an agency that promulgates a regulation requiring certain oil companies to subsidize another competing oil company complies with 5 U.S.C. § 553(b), requiring that a notice of proposed rulemaking set forth the terms or substance of a proposed rule or a description of the subjects and issues involved, when the agency's notice either did not cover the company favored by the regulation at all or proposed uniform treatment of it and its competitors.

2. Whether the notice requirements of 5 U.S.C. § 553(b) can be satisfied, assuming insufficiency of a

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published notice of proposed rulemaking, by subsequent events found by the court below to have given actual notice, in spite of the language of Section 553(b) providing for actual notice as an alternative to published notice only in specified circumstances not present in the present rulemaking proceeding.

3. Whether a regulation may be made effective immediately, despite the lack of any express statement published with the regulation that it was to be effective immediately and despite the fact that no good cause for immediate effect was published with the regulation as required by 5 U.S.C. § 553(d).

4. Whether the Federal Energy Administration regulation requiring petitioners to bear over $8,500,000 of costs of a competitor, The Shell Company (Puerto Rico), is arbitrary and capricious, where the Federal Energy Administration had the power to order the folding in of such costs with those of The Shell Oil Company (United States), and thereby treat similarly petitioners and the Shell group of companies, and where there was in any case no factual basis supporting the purported reasons for imposing such costs on petitioners.

STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 553(b):

> General notice of proposed rulemaking shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—
>
> (1) a statement of the time, place, and nature of public rulemaking proceedings;

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(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C. § 553(d):

The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

STATEMENT OF THE CASE

This case concerns an impromptu and short-lived Federal Energy Administration ("FEA") regulation, promulgated in mid-1974 as part of the effort to control Puerto Rican petroleum product pricing. The regulation required certain marketing subsidiaries of mainland oil companies to pay more for products pur-

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chased from their sole refiner-supplier on the island so that one of their competitors, The Shell Company (Puerto Rico) ("Shell Puerto Rico") could pay less for the same products because the FEA, for regulatory purposes, considered it not directly related to Shell Oil Company on the mainland.

This plan to have competitors subsidize Shell Puerto Rico purchases on Puerto Rico was devised by the FEA without prior notice to and comment from the affected companies. In addition it was imposed upon the affected companies immediately, thereby foreclosing the opportunity to arrange product purchases from other than Commonwealth Oil Refining Company, Inc. ("CORCO") and thus avoid the costly Shell subsidy.

In early 1974 representations were made to the FEA that the consequences of its price regulations were unfair to Puerto Rico. As a result, on March 20, 1974, the FEA published, for immediate effectiveness, a stopgap rule requiring that Puerto Rican marketers owned or controlled by mainland refiners average their costs with the overall costs of the mainland refiners in determining Puerto Rican prices. 39 Fed. Reg. 10434, 10 C.F.R. § 212.91. At the same time the FEA published a notice saying that it would hold a rulemaking hearing in Puerto Rico and receive comments on the question how in the long term the prices of subsidiaries of refiners operating in Puerto Rico should be determined. 39 Fed. Reg. 10454 (March 20, 1974).

The hearing was held. Thereafter, on May 20, the FEA published an opinion and order that amended its regulations in their application to Puerto Rico, making permanent the stopgap resolution of the problem that it had adopted two months before. 39 Fed. Reg.

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17764. The Puerto Rican marketer petitioners[1] herein were required by the amended regulation to sell their products for approximately the mainland prices charged by their parents, substantially below their costs computed independently.

This treatment, however, was not extended to Shell Puerto Rico. The FEA found that it was not controlled by the mainland refiner Shell Oil Company, and on this basis those two companies could not be compelled to average their prices even though both were parts of the Royal Dutch-Shell group of oil companies, a British-Dutch group, and had a common ultimate parent.

The FEA, professing fear of what would happen if Shell Puerto Rico were allowed to price its products above the prices of its competitors, devised an elaborate scheme to prevent this from happening. It ordered CORCO to sell products to Shell Puerto Rico at a price equal to the average prices charged by its other customers, less Shell's profit margin. Standing alone that would have meant, of course, that CORCO would have to absorb the difference between the price it charged Shell and the price paid by Shell's competitors. The FEA's solution to this problem was to require Shell Puerto Rico's competitors to make up the difference. CORCO was authorized to add to what it charged Essosa, Mobil Caribe and Texaco Puerto Rico (and other customers, though principally those three) amounts by which each would contribute, in proportion to its purchases, enough so that in the aggregate

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[1] Mobile Oil Caribe, Inc. ("Mobil Caribe"), Esso Standard Oil S.A., Ltd. ("Essosa") and Texaco Puerto Rico, Inc. ("Texaco Puerto Rico") are marketers of petroleum products on Puerto Rico and were customers of CORCO in early 1974.

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CORCO would receive the full amount by which it was made to subsidize Shell.

The March 20 notice had not suggested that any such special treatment of Shell was proposed or was even contemplated by the FEA as a possibility.

The May 20 order did not specify any effective date and did not set forth any finding or statement of a reason why it should be made effective less than 30 days after publication. Nevertheless, when questions were raised about the order, the FEA insisted that the Shell subsidy payments were payable beginning May 20. The total liability for Shell subsidy payments assessed to the petitioners here amounted to $8.5 million over the life of the subsidy scheme. That life was only four and a half months. Effective October 1 the Shell subsidy, which had proved in practice to be unworkable and inequitable, was abandoned, the market was allowed to work to compel Shell Puerto Rico to keep its prices down, and it was made to look to its foreign parents, as the Puerto Rican marketer petitioners here were made to look to their mainland parents to subsidize their below-cost Puerto Rican prices.

The actions herein challenged the validity of the Shell subsidy rule. Each set of petitioners filed an action in the United States District Court for the District of Columbia asking for a declaration that the Shell subsidy was illegal and for an injunction against any enforcement of it. The District Court granted preliminary injunctions in each of the three actions. In each of the three cases, motions for summary judgment were filed. After joint argument, the District Court granted summary judgment to the respondents dismissing the three complaints and granting judg-

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ment in favor of the intervenors for amounts due under the Shell subsidy regulation.

The District Court held that the March 20 notice "simply fails to indicate that Shell P.R. even was going to be considered at the hearing," but concluded that "actual notice of the subjects and the issues involved," including the Shell subsidy, was given at the hearing and found that the Shell subsidy order was not defective for lack of prior notice. The court further held that despite the lack of any finding of good cause the Shell subsidy order "by its terms . . . required immediate action" and gave it immediate effect. The District Court suggested that the FEA had not adequately considered the various available alternatives to the Shell subsidy or the full consequences of the actions it then proposed to take, but ruled that a "rational basis" existed for the imposition of the Shell subsidy within the "broad regulatory authority" conferred upon the FEA.

The Temporary Emergency Court of Appeals disagreed with the District Court that consideration of Shell Puerto Rico at the April hearing was precluded by the March 20 notice, and without bothering to rigorously parse the plain words of that notice, it held that consideration of Shell was not precluded "either from a technical standpoint or by reasonable intendment. . . ." The Court of Appeals, while noting that "the regulation did not expressly provide that it was to be effective immediately upon publication" and that the rule "did not expressly relate statements . . . that may have indicated good cause for making it immediately effective . . . " concluded that there "obviously was good cause for the regulation to be made effective immediately" and that "by clear implication . . . that was

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its intent." It accepted the District Court's conclusion that the Shell subsidy was "a rational response" by FEA, notwithstanding that the Shell subsidy constituted a particularized treatment of a single company, and held that the Shell subsidy was not arbitrary or capricious.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW ALLOWS EVASION OF THE IMPORTANT PROCEDURAL REQUIREMENTS OF SECTION 4 OF THE ADMINISTRATIVE PROCEDURE ACT

In part because of the greater leeway allowed them by recent decisions of this Court, *United States* v. *Florida East Coast Ry.*, 410 U.S. 224 (1973), *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972), the federal agencies are increasingly availing themselves of the simple notice-and-comment procedures of Section 4 of the Administrative Procedure Act ("APA"), 5 U.S.C. §553(b), in making broad policy and in making rather specific determinations. The trend has been noted in both judicial opinions and scholarly journals. *National Nutritional Foods Association* v. *Weinberger*, 512 F.2d 688, 698 (2d Cir.), *cert. denied*, 96 S.Ct. 44 (1975); *National Petroleum Refiners Association* v. *FTC*, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974); Verkuil, *Judicial Review of Informal Rulemaking*, 60 Va. L. Rev. 185 (1974); Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 39 Cornell L. Rev. 375 (1974); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921 (1965); Note, *The Judicial Role in Defining Procedural Re-*

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quirements for Agency Rulemaking, 87 Harv. L. Rev. 782 (1974).

Given the unmistakable trend toward informal rulemaking as the agencies' favored means of making decisions, it is important that agencies at least abide by the minimal requirements of Section 4 in their informal rulemaking. Broadly, the purposes of Section 4 are to ensure that those affected by a rule have the opportunity effectively and intelligently to participate in its formulation and that they are treated fairly in its promulgation. The decision below allows an agency to evade those purposes by failing to give proper notice of the rule it eventually adopts and by making that rule effective at once, without explanation, and thereby denying to those affected the chance to accommodate themselves to a newly published rule as Section 4 requires in the ordinary case.

Ironically, the decision is in a case involving an agency, the Federal Energy Administration, that Congress exempted from most APA requirements because of what Congress conceived of as the emergency nature of its duties, but that, because of the importance it attaches to fairness in rulemaking, Congress nevertheless specifically made subject to Section 4. Section 5(a)(1) of the Emergency Petroleum Allocation Act, 15 U.S.C. § 754(a)(1).

Both requirements of Section 4 which have been treated by the Court of Appeals are generally applicable to actions by all administrative agencies. In selecting those sections to be applicable to the FEA, Congress evidenced no interest in subjecting the FEA to any lesser standard than that required of all other administrative agencies. The Court of Appeals' opinion

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may thus be taken as broad precedent to guide not only the FEA but the full roster of administrative agencies in fulfilling their statutory responsibilities with regard to notice and hearing, especially where informal rulemaking is involved.

Notice of what an agency intends to do or is considering doing is an important procedural right given to those who fall within the agency's jurisdiction. Indeed, in providing for notice, Section 4 of the APA, 5 U.S.C. § 553(b), expresses the same concern for giving citizens fair notice of government actions that affect their protected interests as do numerous decisions of this Court that hold notice to be one of the most fundamental elements—perhaps *the* most fundamental element of due process. *See, e.g., Goss* v. *Lopez*, 419 U.S. 565, 579 (1975).

A. Published Notice

When interested parties are advised of proposed agency action, they may address the proposed act, put it in context, discuss its ramifications, and generally bring to bear other perspectives on the intended act. The March 20 notice utterly failed to afford interested parties that opportunity with regard to the special treatment accorded Shell Puerto Rico in the subsequent May 20 order. While the notice must be examined in its entirety, it is instructive to quote that part of it on which the District Court and the Court of Appeals focused, with differing results:

> "Notice is hereby given that the Federal Energy Office will receive written comments and hold a public hearing in San Juan, Puerto Rico with respect to whether certain entities operating in Puerto Rico which are owned or controlled by re-

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> finers should be subject to the price regulations applicable to refiners, to the price regulations applicable to resellers, or to some other form of price regulation. By an amendment to the rule with respect to resellers, the Federal Energy Office today has made clear that certain of such entities are subject to the refiner price regulations, and this proceeding is to determine whether that treatment or some other treatment under the Mandatory Petroleum Price Regulations is appropriate." 39 Fed. Reg. 10454 (March 20, 1974).

Indeed, as noted by the District Court, under the FEA's present interpretation of its own notice, Shell Puerto Rico was not included as an "entity of a refiner" and hence was not even mentioned in the March 20 notice.

On this point, the Court of Appeals disagreed but did not suggest—and we can find in the notice itself no basis for such suggestion—that the notice in any way indicated that Shell or any other individual marketer might be singled out for special treatment at the expense of petitioners and other competitors. In particular, the notice did not constitute fair warning either of Shell's exemption from the refiner rule or of the requirement that petitioners and CORCO's other customers subsidize Shell's operations in Puerto Rico. The hearing at which the FEA now claims to have been considering promulgation of the Shell subsidy took place in early April, 1974. If the FEA were truly considering the Shell subsidy at that time, it would have been an easy matter to publish its intention then and solicit comments from interested parties in sufficient time to have it effective May 20, the date the Shell subsidy regulation was published. Unless, as we submit the Court of Appeals decision implies, a wholly general notice is sufficient to validate *any* action logically em-

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braced within its terms—*i.e.*, "some other form of price regulation"—the Shell subsidy should be held invalid for noncompliance with the notice requirement of Section 4 of the APA. *See Shell Oil Co.* v. *FEA*, 527 F.2d 1243 (T.E.C.A. 1975); *Texaco, Inc.* v. *FPC*, 412 F.2d 740 (3d Cir. 1969).

B. Actual Notice

Section 4 provides for one exception to the requirement that notice be published in the Federal Register, that exception being where "persons subject thereto are named *and* either personally served or otherwise have actual notice thereof in accordance with law." 5 U.S.C. § 553(b). (Emphasis added.) Petitioners were not named in the March 20 notice; therefore, under the clear language of the Act, this exception to the requirement of published notice is not applicable. Nevertheless, both the District Court and the Court of Appeals held that the Section 4 requirements had been met by events subsequent to the published notice, events which both courts found rose to the level of "actual notice."

Petitioners submit that both the District Court and the Court of Appeals erred in concluding that petitioners received "actual notice" during the hearings of April 8 and 9. The comments at the hearing relied on by those courts, when looked at from the perspective of those attending the hearing (who were, of course, without the benefit of hindsight) cannot be said to have fairly alerted them to the subsequent imposition of the Shell subsidy. Indeed, the noncommittal responses of those questioned at the hearing about Shell Puerto Rico indicated that they had no idea that the "treatment" of Shell Puerto Rico decided upon by the FEA might require their companies to subsidize Shell. Finally, the conspicuous failure of all whom the courts

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below found to have had "actual notice" of the Shell subsidy to submit any comments after the hearing with respect to it is strong evidence of the lack of notice, "actual" or otherwise. *See Wagner Electric Co.* v. *Volpe*, 466 F.2d 1013, 1019-20 (3d Cir. 1972); *Natural Resources Defense Council, Inc.* v. *SEC*, 389 F. Supp. 689, 700 (D.D.C. 1974).

Nevertheless, petitioners do not ask this Court to review the essentially factual finding of "actual notice." Petitioners ask, rather, that this Court grant certiorari to review the determinations of the courts below that a deficiency in published notice was thereafter curable by "actual notice." Such a conclusion, we submit, is contrary to the express language of Section 4. That language is clear and susceptible to but one interpretation: actual notice is a permissible substitute for written notice only in a rulemaking proceeding in which there are named parties.[2] *See Rodway* v. *United States Department of Agriculture*, 514 F.2d 809 (D.C. Cir. 1975). It is undisputed that there were no named parties in this proceeding. The "actual notice" exception to the statutory requirement of prior written notice, thus, simply does not apply, and the language of the statute is, we submit, too clear to admit of any additional judicially created "actual notice" exception.

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[2] The authoritative Attorney General's Manual on the Administrative Procedure Act 29 (1947) identified a proceeding involving the rates of named carriers or utilities as an example of the kind of rulemaking proceeding that would fall under the exception language of the rule. Even in such a case, once the party is named, the actual notice must be "in accordance with law" and, as appears from the statutory context, must exist in advance of the proceeding and not be imparted during it.

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Indeed, some of the reasons that led Congress to limit the "actual notice" exception to those proceedings in which there are named adversary parties are exemplified in the record of this case.

Thus, among those from whom compliance with the Shell subsidy regulation was sought by the FEA were the parents of the Puerto Rican marketers, and yet, nowhere in the record is there an indication that representatives of those parent companies were present at the April hearings; the record reflects only that "representatives" of the marketers were present.[3] The record below amply reflects the independence of the Puerto Rican marketers from their parents. For example, in the case of Mobil Caribe, it reflects that "Caribe has operated since 1959 as a separate entity and has exercised the exclusive price authority with respect to its sales subject only to governmental price control." (Stipulation of Undisputed Fact). Because nothing before the court supported any implication that all the matters at the hearing would be reported in full by the marketers' "representatives" to their corporate parents the court clearly erred in finding actual notice to those parents.

The ruling below is inconsistent with the philosophy behind *Florida East Coast Ry., supra,* a philosophy clearly supported by the legislative history of the APA, which stressed the agency's responsibility to inform the public of its intentions so that interested parties may

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[3] There is a suggestion in the opinion of the Court of Appeals that all the petitioners were represented at the hearing. Appendix at 68a-69a. The suggestion, by its terms, is based on an affidavit in the record and counsel's agreement that the affidavit was accurate in describing who was present at the hearing. The affidavit recites only the presence of officers or representatives of the Puerto Rican marketer petitioners.

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submit their views. H. Rep. No. 1980, 79th Cong., 2d Sess. (1946); S. Rep. No. 752, 79th Cong., 1st Sess. (1945). The opinion of the court below opts for a disclosure of virtually nothing to those affected, so that the agency may proceed without voiced opposition, but also without enlightenment, to promulgate whatever plans it may conceive in darkness.

C. Immediate Effectiveness

Finally, Section 4(c) of the APA, 5 U.S.C. § 553(d), provides that "the required publication . . . of a substantive rule [in the Federal Register] shall be made not less than 30 days before its effective date," with three exceptions, two of which are not even arguably pertinent, and the third of which reads, "except . . . as otherwise provided by the agency for good cause found and published with the rule."

In this case good cause for an earlier effective date was not found either in the Shell subsidy rule itself, which was silent as to its effective date, or in anything published with the rule. Therefore the rule, by the terms of Section 553(d), could not be effective until at least 30 days after it was published in the Federal Register.

In its Notice of Probable Violation, however, the FEA took the position, which it still maintains, that the Shell subsidy went into effect immediately on publication of the rule. The court below sustained this position on the ground that "there obviously was good cause for the regulation to be made effective immediately, and by clear implication . . . that was its intent."

But satisfaction of the third exception to the rule of Section 553(d) is simple for the agency that wishes

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to specify a rule for early effectiveness. If there is good cause, the finding of good cause can be made and the earlier effective date specified. The FEA itself on numerous occasions has published rules for immediate effectiveness and has accompanied such publications with findings of good cause.

To allow the matter to be left to inference, therefore, is needless from the standpoint of the agency, and it defeats the very purpose of Section 553(d). The purpose, as explained by the Senate committee in reporting the bill that was enacted as the APA, is to "afford persons affected a reasonable time to prepare for the effective date of a rule or to take any other action which the issuance of rules may prompt." S. Rep. No. 752, 79th Cong., 1st Sess. 15 (1945).

The impact of allowing immediate effectiveness to be inferred after the fact from the terms of a rule that was silent on the point was particularly harsh here because it actually denied to persons affected the benefit of action they took that was prompted by the issuance of the rule. The Mobil petitioners acted during the statutory 30-day period to arrange their business affairs so as completely to avoid the impact of the Shell subsidy after that period. Their reasonable expectation that such action would result in their escaping the onus of the Shell subsidy was frustrated.

Other courts of appeals, unlike the Temporary Emergency Court of Appeals, have recognized the policy of Section 4. The Court of Appeals for the Second Circuit has declared that the 30-day provision "merely establishes a minimum period of notice." The court added that "[i]t does not authorize the use of an effective date that is arbitrary or unreasonable," and

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required an agency to afford a "grace period" much longer than 30 days in order to give persons affected by a rule "more opportunity to adjust to the new rule." *National Association of Independent Television Producers and Distributors* v. *FCC*, 502 F.2d 249, 254-55 (2d Cir. 1974). *See also Natural Resources Defense Council, Inc.* v. *Train*, 510 F.2d 692, 711 (D.C. Cir. 1974).

II

THE DEFERENCE OF THE COURT BELOW TO THE AGENCY'S JUDGMENT IN PROMULGATING THE SHELL SUBSIDY REGULATION WAS AN ABDICATION OF ITS JUDICIAL REVIEW FUNCTION

In its opinion, the Temporary Emergency Court of Appeals recognized the unique qualities of the Shell subsidy order, which was designed by its terms to apply only to Shell Puerto Rico, at the expense of other customers of CORCO. There are no facts in the record that in any way justify treating Shell differently from its competitors. Aside from the fact that ultimate control of Shell is in a foreign company, not a domestic company, there is nothing in the record to suggest that Shell Puerto Rico and its United States affiliate would have been subjected to any other or greater hardship than the petitioners. And so far as foreign control of Shell is concerned, such control is legally no obstacle to regulating its domestic entities and operations in the same way and to the same extent as petitioners.

Both courts below, in essence, relied entirely upon administrative expertise as support for the FEA's conclusion that Shell should receive different treatment. The FEA has advanced from time to time different reasons why the particular form of special treat-

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ment afforded to Shell should be preferred over others that might have been considered but it has advanced no reason, and we submit the record contains none, why Shell should be given special treatment at all. There is only its bare conclusion that for some undisclosed reason, foreign controlled refiners and their marketing affiliates should in this particular situation be treated differently than those controlled in the United States.

Courts are generally charged with the responsibility of voiding agency action found to be arbitrary or capricious, and Congress has directed that the same standard of judicial review shall apply to actions taken by the FEA. Section 5(a)(1) of the Emergency Petroleum Allocation Act, 15 U.S.C. § 754 (a)(1), incorporating by reference Section 211(d) of the Economic Stabilization Act of 1970. We submit that such extreme deference to administrative expertise does not accord with the standards established by this Court in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971) and *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974), and effectively amounts to no review at all. The question whether the FEA is to be subjected to a different and less exacting standard is an important and pressing question in view of the magnitude of the interests affected and the impact that the FEA has on the economy as a whole.

Since appeal from decisions of the district courts in cases involving review of FEA regulations or orders are confined to the Temporary Emergency Court of Appeals, it is impossible for a conflict of decisions to arise in respect of this question. Review by this Court should not be withheld, therefore, because of the absence of such conflict. *Exhibit Supply Co.* v. *Ace Patents Corp.*, 315 U.S. 126, 128 (1942); *Muncie Gear*

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Works, Inc. v. *Outboard, Marine & Manufacturing Co.*, 315 U.S. 759, 766 (1942); *Mackay Radio & Telegraph Co.* v. *Radio Corp. of America*, 306 U.S. 86, 89 (1939); *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U.S. 47, 50 (1938).

CONCLUSION

For the reasons set forth above, a writ of certiorari should be granted as prayed for.

Respectfully submitted,

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April 16, 1976

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APPENDIX

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Title 10—Energy

CHAPTER II—FEDERAL ENERGY OFFICE

PART 212—MANDATORY PETROLEUM PRICE REGULATIONS

Reseller Rule in Puerto Rico

This amendment to 10 CFR 212.91 is to make clear that the special provisions of that regulation under which certain entities of a refiner may be considered to be resellers shall not apply to any entity of a refiner which operates in Puerto Rico and which is owned or controlled by a refiner that is subject to the price regulations of Subpart E of Part 212 of the Federal Energy Office.

This action is being taken to insure that the Puerto Rican subsidiaries of refiners will be subject to the price regulations applicable to refiners until a determination is made as to whether such treatment is appropriate. The question of whether certain Puerto Rican subsidiaries of refiners should be considered as refiners, as resellers, or should be subject to some other form of price regulation, involves difficult questions which can best be resolved in a public rulemaking proceeding. A notice of proposed rulemaking and public hearing is therefore also being issued today, and it is intended to elicit information upon which a final decision with respect to this issue will be made.

Because the purpose of these amendments is to provide immediate guidance and information with respect to the mandatory petroleum price regulations and to preserve the present price structure in Puerto Rico pending resolution of the rulemaking proceeding referred to above, the Federal Energy Office finds that normal rulemaking procedure is impracticable and that good cause exists for making these amendments effective in less than 30 days.

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(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, E.O. 11748, 38 FR 33575; Economic Stabilization Act of 1970, as amended, Pub. L. 92-210, 85 Stat. 743; Pub. L. 93-28, 87 Stat. 27; E.O. 11730, 38 FR 19345; Cost of Living Council Order No. 47, 39 FR 24)

In consideration of the foregoing, Part 212 of Chapter II, Title 10 of the Code of Federal Regulations is amended as set forth below effective immediately.

Issued in Washington, D.C., March 18, 1974.

WILLIAM N. WALKER,
General Counsel,
Federal Energy Office.

1. Section 212.91 is amended to read as follows:

§ 212.91 Applicability.

This subpart applies to each sale of a covered product (other than the first sale of crude petroleum) by resellers, reseller-retailers, and retailers, and to each sale of crude petroleum (other than the first sale) by a refiner. For purposes of this subpart, "reseller" includes any entity of a refiner (other than an entity which operates in Puerto Rico) which is engaged in the business of purchasing and reselling covered products, provided that the entity does not purchase more than 5 percent of such covered products from the refiner including any entities which it directly or indirectly controls and provided further that the entity has historically and consistently exercised the exclusive price authority with respect to sales by the entity.

[FR Doc. 74-6633 Filed 3-19-74; 11:32 am]

FEDERAL ENERGY OFFICE

[10 CFR Part 212]

PUERTO RICO

Proposed Price Regulations and Public Hearing

Notice is hereby given that the Federal Energy Office will receive written comments and hold a public hearing in San Juan, Puerto Rico with respect to whether certain entities operating in Puerto Rico which are owned or controlled by refiners should be subject to the price regulations applicable to refiners, to the price regulations applicable to resellers, or to some other form of price regulation. By an amendment to the rule with respect to resellers, the Federal Energy Office today has made clear that certain of such entities are subject to the refiner price regulations, and this proceeding is to determine whether that treatment or some other treatment under the Mandatory Petroleum Price Regulations is appropriate.

The background of this proceeding and some of the issues it raises are as follows:

Certain refiners subject to the price regulations of Subpart E own, control, or are otherwise affiliated with entities which operate in Puerto Rico.

Certain of these entities purchase the products they sell in Puerto Rico from Commonwealth Oil and Refining Company (CORCO) and/or from Gulf Oil Company, both of which produce gasoline in Puerto Rico. Certain of these entities also supply crude oil to CORCO, either themselves or through related entities, under various contractual terms.

If the entities which purchase the products they sell in Puerto Rico from CORCO and Gulf were to be treated as resellers, they would be permitted, generally, to pass

through directly to their customers the cost of the products they purchase. If such entities were to be treated as refiners, the cost of the products purchased in Puerto Rico would be included as part of the affiliated refiner's overall cost of its products, and would be passed through to all customers of the refiner, throughout the United States, including Puerto Rico.

Because CORCO refines principally Venezuelan crude oil which is exempt from price regulation, its products are being sold at generally higher prices than the prices charged by refiners which use domestic crude oil subject to price regulation. Thus, if the entities of a refiner operating in Puerto Rico are treated separately under the price regulations as "resellers," the prices charged in Puerto Rico would generally reflect the higher prices of exempt crude oil, whereas if they are treated as part of their affiliated "refiners," the prices charged in Puerto Rico would generally reflect the lower average price of all crude oil, both domestic and foreign, of that refiner.

On the one hand, it may be urged that Puerto Rico should not pay prices that reflect directly the higher prices of foreign crude oil. On the other hand, it may be urged that the entities operating in Puerto Rico have historically been treated as separate entities and that not to treat them now as resellers would require them to face financial hardship in Puerto Rico.

Among the relevant facts which the interested parties to this proceeding should address themselves to are the following:

(1) The place in the overall corporate structure of the refiner which is occupied by the Puerto Rican entity of the refiner and by the entity of the refiner, if any, which has supplied crude oil or other products to Puerto Rico.

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(2) The arrangements under which the Puerto Rican entity and/or other entities, have historically supplied and/or purchased crude oil and other products in Puerto Rico, the identity and quantities of such products and where they are sold, and the effects of the Mandatory Petroleum Allocation Program on the current operation of such arrangements.

(3) The extent to which profits and/or losses of the Puerto Rican entity of a refiner, and/or of related entities which have supplied or purchased products in Puerto Rico, have gone to the refiner.

(4) The effects of any proposed rule on prices in Puerto Rico, on prices in the United States mainland, on the overall market structure in Puerto Rico, on the entities operating in Puerto Rico, and on the refiners and their related entities.

(5) The historical relationship of prices charged and changes in prices charged by Puerto Rican entities to prices charged and changes in prices charged by the refiner in the United States mainland.

Information concerning the filing of written comments and the time and place of the public hearing in San Juan, Puerto Rico, which is tentatively scheduled for April 4 and 5, 1974, will be published as soon as the necessary arrangements have been made. This notice is being issued today so that all interested parties will have as much advance notice as possible, consistent with the expedited treatment which is planned for this proceeding.

Issued at Washington, D.C., on March 18, 1974.

WILLIAM N. WALKER,
General Counsel.

[FR Doc. 74 6632 Filed 3-19-74; 11:32 am]

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Title 10—Energy

CHAPTER II—FEDERAL ENERGY OFFICE

PART 212—MANDATORY PETROLEUM REGULATIONS

Puerto Rico

I. Introduction

On March 18, 1974, the Federal Energy Office issued a notice of "proposed price regulation and public hearing," to announce that it would receive written comments and hold a public hearing in San Juan, Puerto Rico with respect to its price regulations in Puerto Rico (39 FR 10454, March 20, 1974). On March 26, 1974, a "further notice of proposed price regulation and public hearing" was issued by FEO, which specified the dates for the hearing as April 8 and 9, 1974 (39 FR 11514, March 27, 1974).

Hearings were held on April 8 and 9, 1974, and on May 6, 1974, the FEO issued a press release to announce its determination in this proceeding to treat all entities of mainland United States refining firms that operate in Puerto Rico as refiners under the FEO price regulations. This means that in determining selling prices, these entities must average the cost of the petroleum products they purchase in Puerto Rico with all other product costs of the mainland firms of which they are a part. The higher costs of the products purchased in Puerto Rico—which are all refined from foreign crude oil, which is exempt from U.S. price controls—cannot be passed through directly in the prices charged in Puerto Rico.

The background of this proceeding and some of the issues it raised are as follows.

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Certain refiners on the mainland United States, which are subject to the general price regulations of the FEO for refiners, also own, control or are otherwise affiliated with entities which operate in Puerto Rico.

Certain of these entities operating in Puerto Rico purchase the products they sell in Puerto Rico from Commonwealth Oil Refining Company, Inc. (CORCO) and/or from Gulf Oil Company, both of which operate refineries in Puerto Rico.

CORCO refines all foreign source crude oil which is exempt from price regulation and is not affiliated with any mainland U.S. refiner. Its products are therefore being sold at generally higher prices than the prices charged by refiners which use both foreign crude oil and domestic crude oil, which is subject to price regulation. Thus, if the entities of a refiner operating in Puerto Rico were to be treated separately under the price regulations as "resellers," the prices charged in Puerto Rico would generally reflect the higher prices of exempt crude oil, whereas, by treating them as part of their affiliated mainland U.S. refiners, the prices charged in Puerto Rico will generally reflect the lower average price of all crude oil, both domestic and foreign, of those refiners.

The FEO amended its regulations on March 18, 1974, to make clear that the Puerto Rican entities of mainland U.S. refiners would be subject to the price regulations applicable to refiners until a determination was made in this proceeding as to whether such treatment is appropriate.

II. The Comments of the Interested Parties

The following interested parties participated in this proceeding by filing written comments, by making oral presentations, or both: The Commonwealth of Puerto Rico, by Federico Hermandez Denton, Secretary of the

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Department of Consumer Affairs, and by Teodoro Moscoso, Administrator of the Economic Development Administration; Commonwealth Oil Refining Company, Inc. (CORCO), which operates its only refinery in Puerto Rico and sells gasoline to various marketing companies in Puerto Rico; Caribbean Gulf Refining Corp., which operates a refinery in Puerto Rico and is a wholly owned subsidiary of Gulf Oil, and Gulf Petroleum, S.A., which is a marketing company in Puerto Rico, and which is also a wholly owned subsidiary of Gulf Oil; Arco Caribbean, Inc., which is a marketing company in Puerto Rico and is wholly owned subsidiary of Atlantic Richfield Company; Esso Standard Oil, S.A., Limited and Esso Standard Oil Company (Puerto Rico), both of which are marketing companies in Puerto Rico and are wholly owned subsidiaries of Exxon: Compañia Petrolera Chevron, Inc., which is a marketing company in Puerto Rico and is a wholly owned subsidiary of Standard Oil Company of California; Texaco Puerto Rico, Inc., which is a marketing company in Puerto Rico and is a wholly owned subsidiary of Texaco, Inc.; Mobil Oil Caribe Inc., which is a marketing company in Puerto Rico and is a wholly owned subsidiary of Mobil Oil Corporation; The Shell Company (Puerto Rico) Limited, which is a marketing company in Puerto Rico and is 99.9 percent owned by The Shell Petroleum Company, Limited, an English Company; The Shell Oil Company, a Delaware Corporation, which does not have any direct or indirect interest in The Shell Company (Puerto Rico), and the stock of which is approximately 30 percent publicly held and 70 percent owned by Shell Petroleum N.V., a Netherlands company. (The stock of Shell Petroleum, N.V. is owned 60 percent by Royal Dutch Petroleum Company, The Hague, Netherlands, and 40 percent by the "Shell" Transport and Trading Company, Limited, London, Eng-

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land. The "Shell" Transport and Trading, Limited, London, England, owns indirectly, The Shell Company (Puerto Rico)); The Association of Gas Retailers of Puerto Rico, by Efrian Reyes, President; and the Federation of Gasoline Retailers of Puerto Rico, by Heriberto Torres Vazques and by Orlando Vargas.

The marketing entities of mainland U.S. refiners operating in Puerto Rico generally urged that the traditional and historical approach to pricing petroleum products in Puerto Rico is based on the use of foreign source crude oil and on the pricing of products produced from that oil under a Caribbean price structure. They further urged that any attempt to establish a different price structure would involve subsidies from the mainland, and would result in an economic incentive to abandon operations in Puerto Rico because the Puerto Rican market would no longer be a profit center. As further support for the argument that Puerto Rico should be treated separately, some marketing companies pointed out that the logistics of supply required a Latin American or Caribbean source of supply, that Puerto Rico is identified with the Latin American area for marketing purposes, that Puerto Rico has a unique semi-autonomous relationship with the United States, which results in a separate tax jurisdiction, and that the U.S. import quota system, under which the refining industry in Puerto Rico operates, recognizes that Puerto Rico relies on foreign source crude.

The further point was made, with respect to Puerto Rico's separate tax status, that under the refiner pricing rule, the cost increases incurred in Puerto Rico would be recovered in large part by the prices charged on the mainland and as a result, the net income of the mainland company would increase and be subject to the Federal corporate income tax, which it is not subject to in Puerto Rico.

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One of the marketing entities operating in Puerto Rico (Arco), stated that price regulation as a refiner was preferable because it would lead to a more orderly marketing situation, which would benefit consumers and the industry.

The Commonwealth of Puerto Rico urged that the refiner price rule be applied in Puerto Rico. The Commonwealth stated that the lower prices that result from the refiner price rule are essential to the economy of Puerto Rico. The adverse impact on the economy of Puerto Rico resulting from the increased prices of foreign crude oil has been particularly severe, since the island is dependent on petroleum for 99 percent of its energy requirements, all of which is of foreign origin. The Commonwealth estimated that the increased prices of crude oil would result in a total impact on its economy in 1974 of over $300 million in increased costs to consumers for gasoline, electricity, and other fuels, based on the refiner price rule, and an additional $144 million for gasoline and diesel fuel if the reseller rule were to be applied.

The Government further urged that the economy of Puerto Rico, which is heavily dependent on imports, has a low per capita income and high rates of inflation and unemployment.

All of the marketing companies asserted that, whichever price rule is to be applied, adjustments to their May 15, 1973 prices were needed because of the unusually small margins in effect on that date. These small margins resulted from the price controls of the Puerto Rican government which were then in effect, but which were subsequently modified to restore margins to approximately their historical levels.

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III. Conclusions

The FEO has concluded that the refiner price rule should be applied in Puerto Rico. The foremost consideration in this regard is the adverse impact that the reseller rule would have on the economy of Puerto Rico.

The Emergency Petroleum Allocation Act of 1973 included Puerto Rico in the allocation and price regulation system contemplated by the Act, and the need to maintain "equitable" prices for petroleum products in Puerto Rico is particularly acute in view of the nature of the Puerto Rican economy.

Although Puerto Rico does have a semi-autonomous governmental status, the fact that it has been included in the definition of the United States under the Emergency Petroleum Allocation Act of 1973 means that the averaging of costs in Puerto Rico with costs in the mainland United States cannot properly be regarded as a subsidy, any more than the averaging of costs with respect to one state where costs are high with those of another state where costs are low can be regarded as a subsidy from one state to another.

The FEO recognizes, however, that the differing treatment of Puerto Rico under the tax laws of the United States results in subjecting increased product cost recoupment revenues to Federal corporate income taxes in the mainland United States, which would not be subject to such taxes in Puerto Rico. The FEO has concluded, however, that the public policy expressed in the Emergency Petroleum Allocation Act of 1973, together with the consistent United States policy of promoting the Puerto Rican economy, favors the conclusion reached here. The tax consequences on each marketing company will vary, depending on its tax situation, and FEO will cooperate with the affected companies in trying to resolve tax problems resulting from this decision.

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The comments of the marketing companies were uniform in urging that some adjustment in their May 15, 1973 margins was needed, and the FEO has found that an adjustment should be made, and that the January 15, 1974 margins, which is the date the FEO regulations became applicable in Puerto Rico, are appropriate. Accordingly, lawful base prices for firms in Puerto Rico which sell at the wholesale level to retail sales outlets and which are wholly owned, directly or indirectly, by mainland United States refining firms shall be the weighted average cost of products purchased on May 15, 1973, plus the January 15, 1974 margin on those products plus the amount of increased product cost allocated to the products under the refiner's price formulae of § 212.83 (c).

Increased product costs incurred in Puerto Rico after January 15, 1974, and through April 30, 1974, which have not been recouped in revenues from sales in Puerto Rico through May 30, 1974 and which have not been previously included under the "B" or "G" factors of the refiner's price formulae, may be included under the "G" factor as unrecouped increased product costs when the costs are calculated for the month of May, 1974, to determine lawful base prices for June, 1974. Increased product costs incurred in Puerto Rico during the month of May, 1974, may also be included in the refiner's price formulae, under the "B" factor, when the costs are calculated for the month of May, 1974, (the month of measurement), to determine lawful base prices for June, 1974 (the current month), and increased product costs should thereafter be taken into account in the refiner's price formula on current basis. The amount of unrecouped increased product costs in Puerto Rico for each product shall be the weighted average unit cost of the product sold during the period of January 15, 1974 through April 30, 1974, plus the January 15, 1974

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margin on that product, multiplied by the volume of the product sold during the period, less the revenues received on sales of the product during the period of January 15, 1974 through May 30, 1974.

As noted above, Shell (Puerto Rico) is not owned, directly or indirectly by a mainland United States refiner. Accordingly, it must be treated as a reseller under the price regulations and permitted to pass through its increased product costs in the form of increased prices. In order to avoid the potentially disruptive and chaotic effects in the marketplace of having one marketer with prices substantially in excess of those of the other marketers, FEO has determined that it is necessary to require CORCO to adjust its prices to Shell (Puerto Rico) downward, and to permit CORCO to make an upward adjustment in the prices it charges to its other customers, so that it will continue to obtain a dollar-for-dollar pass through of its increased product costs.

The selling price to Shell (Puerto Rico) by CORCO for each product during each month shall be the weighted average price at which CORCO's products are currently being sold by marketers in Puerto Rico other than Shell (Puerto Rico), less the January 15, 1974 margin of Shell (Puerto Rico) on that product. The total number of dollars that CORCO would otherwise have recouped through sales to Shell (Puerto Rico) at prices determined under the refiner's price formulae may be applied equally to the prices charged during the same month in sales to purchasers other than Shell (Puerto Rico).

Under the reseller price rules, and with an adjusted margin, the lawful base price that may be charged by Shell (Puerto Rico) shall be the weighted average cost of the product in inventory on May 15, 1973, plus the January 15, 1974 margin of Shell (Puerto Rico) on that prod-

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uct, plus increased product costs (the difference between current weighted average unit cost of the product in inventory and the May 15, 1973 weighted average unit cost of the product in inventory), plus an amount to recoup increased product costs which were not recouped between January 15, 1974 and May 15, 1974, but not including any price increases pursuant to § 212.93(b).

The amount permitted to be added by Shell (Puerto Rico) for unrecouped costs in determining its lawful base prices shall be the total number of dollars of unrecouped increased product costs for each product, as defined below, which shall be equally applied to the total volume of each product estimated to be sold between May 15, 1974, and February 28, 1975. The unrecouped increased product costs for each product shall be the weighted average unit cost of the product sold during the period of January 15, 1974 through May 15, 1974, plus the January 15, 1974 margin of Shell (Puerto Rico) on that product, multiplied by the volume of the product sold during that period, less the revenues received on sales of the product during the period.

Issued in Washington, D.C. on May 16, 1974.

WILLIAM N. WALKER,
General Counsel,
Federal Energy Office.

[FR Doc. 74-11616 Filed 5-16-74; 3:29 pm]

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UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

Civ. A. Nos. 74-1617, 74-1658
and 74-1705

EXXON CORPORATION and ESSO STANDARD OIL S. A., LTD.,
Plaintiffs,

v.

FEDERAL ENERGY ADMINISTRATION, *et al.*,
Defendants,

UNITED STATES OF AMERICA and COMMONWEALTH
OIL REFINING COMPANY,
Intervenor-Defendants.

MOBIL OIL CORPORATION and MOBIL OIL CARIBE, INC.,
Plaintiffs,

v.

FEDERAL ENERGY ADMINISTRATION, *et al.*,
Defendants,

UNITED STATES OF AMERICA, *et al.*,
Intervenor-Defendants.

TEXACO, INC. and TEXACO PUERTO RICO, INC.,
Plaintiffs,

v.

FEDERAL ENERGY ADMINISTRATION, *et al.*,
Defendants,

UNITED STATES OF AMERICA and COMMONWEALTH
OIL REFINING COMPANY,
Intervenor-Defendants.

June 17, 1975

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FLANNERY, District Judge.

The three above-captioned cases are before the court on cross-motions for summary judgment. Although the cases have not been consolidated, they involve many common questions, have been briefed according to similar schedules, and were argued together on March 17, 1975. This Memorandum Opinion will cover the issues in all three cases, pointing out where necessary those issues that pertain only to certain parties

These actions all challenge the Federal Energy Administration's [FEA] issuance of a mandatory petroleum price regulation pertaining to the price of petroleum products in Puerto Rico. This court has jurisdiction under the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 754 (a)(1) (Supp.1975) and section 211 of the Economic Stabilization Act of 1970. The plaintiffs assert that the regulation must be set aside for both substantive and procedural reasons. These challenges raise a host of issues which make simple resolution quite difficult. Accordingly, the court first will review the factual background of these cases and will set forth the procedural posture of each case. Then the court will address the merits of the various challenges.

I. Factual Background

The Commonwealth of Puerto Rico is uniquely dependent upon petroleum products for its energy needs. Indeed, 99 percent of Puerto Rico's energy is derived from petroleum products and nearly 100 percent of that petroleum is imported from foreign countries, chiefly Venezuela. Historically foreign crude oil has been considerably less expensive than domestic crude oil and in the past Puerto Rico has benefited by having prices lower than those in main-

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land United States. Thanks at least in part to these lower prices, Puerto Rico, economically the poorest part of the United States, recently has experienced rapid growth at a rate considerably in excess of that in mainland United States. Much of this growth has centered in an extensive petro-chemical and oil-refining industry.

In 1973 world-wide oil prices increased dramatically. Congress, reacting to these price increases and to shortages and threatened shortages of petroleum products, passed the Emergency Petroleum Allocation Act of 1973 on November 27, 1973. In passing the Act Congress determined that there did exist or shortly would exist a critical shortage of petroleum products due to "inadequate domestic production, environmental constraints, and the unavailability of imports sufficient to satisfy domestic demand. . . ." 15 U.S.C. § 751(a)(1) (Supp.1975). Congress determined that such shortages had caused or shortly would cause severe economic dislocations and hardships which "jeopardize the normal flow of commerce and constitute a national energy crisis which is a threat to the public health, safety, and welfare . . . ." *Id.* § 751(a)(2)-(3). Puerto Rico specifically was included within the definition of the United States and thus Congress determined that the potential economic crisis due to shortages of petroleum products existed in Puerto Rico. *Id.* § 752(7). Accordingly, to combat this energy crisis Congress directed the President as follows:

> Not later than fifteen days after November 27, 1973, the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts

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> specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation. *Id.* § 753(a).

Thus Congress made mandatory that the President both allocate supplies and regulate prices of petroleum products.

Pursuant to this Congressional directive, the President, through his delegate, published proposed regulations and later, on January 15, 1974, issued the mandatory petroleum allocation and price regulations. *See* 39 Fed.Reg. 1923-61 (1974), *codified in* 10 C.F.R. §§ 205, 210-212. Under the petroleum price regulations—the regulations directly in issue in these cases—FEA set up two general pricing rules, the reseller and the refiner. These rules are used to determine the maximum price which a firm may charge for its products and provide for a dollar-for-dollar pass-through of increased product costs. *See* 15 U.S.C. § 753(b)(2)(A) (Supp.1975). When a company that is subject to the refiner rule incurs increased products costs, it must determine the weighted average of all such increased costs and may pass them through equally over its entire distribution system. When a company subject to the reseller rule incurs increased product costs, it may pass its increased product costs directly through to its customers without averaging such increased costs equally through an entire or larger distribution system. Generally, the refiner rule applies to any firm defined as a "refiner," meaning a firm or part of a firm "which refines covered products or blends and substantially changes covered products. . . ." 10 C.F.R. § 212.-31. The reseller rule applies generally to any firm defined as a "reseller," meaning "a firm (other than a refiner or retailer) or that part of such a firm which carries on the trade or business of purchasing covered products, and re-

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selling them without substantially changing their form to purchasers other than ultimate consumers." *Id.* The reseller rule also applied to any entity of a refiner that was engaged in purchasing and reselling covered products, provided that the entity received less than five percent of those products from its parent refiner, and provided "that the entity has historically and consistently exercised the exclusive price authority with respect to sales by the entity." *Id.* § 212.91.

In Puerto Rico there are two main refiners of crude oil—Caribbean Gulf Refining Corporation and the Commonwealth Oil Refining Company [CORCO]. Under the regulations promulgated by FEA, Caribbean Gulf and CORCO would be treated under the refiner rule. Caribbean Gulf would have to average its increased product costs in with the increased product costs incurred by its parent, Gulf Oil Corporation of the United States. CORCO, however, having no larger distribution system, would be permitted to pass its increased product costs directly to Puerto Rican wholesalers. This situation resulted in Gulf, which refined about 25 percent of Puerto Rico's petroleum products, being required to sell its refined products at a price considerably below that of CORCO, the seller of about 75 percent of Puerto Rico's refined petroleum products.

This situation was made more complex because certain wholly owned subsidiaries of mainland United States refiners, including Esso Standard Oil S.A., Ltd. [ESSO], subsidiary of EXXON Corporation, Mobil Oil Caribe, Inc. [Mobile Caribe], subsidiary of Mobil Oil Corporation, and Texaco Puerto Rico, Inc. [Texaco P.R.], subsidiary of Texaco, Inc., bought all of their petroleum products from

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CORCO and were subject to the reseller rule. These subsidiaries, upon purchase of petroleum products from CORCO, could pass on any increased prices that CORCO passed on to them. This would have meant that a large portion of the sellers of petroleum products in Puerto Rico (together the EXXON, Mobil, and Texaco subsidiaries sell about 55-60 percent of all petroleum products sold in Puerto Rico) would have been in a position to pass extremely large price increases directly to the Puerto Rican consumer. These price increases would have been larger than those being incurred in the mainland United States because CORCO depended almost entrely on Venezuelan crude oil for its supplies and the price of that oil had increased from about $3 to over $14 per barrel while the price of mainland crude oil had been held to about $5.50 per barrel. Thus, under FEA's price regulations that were promulgated in January, 1974, Puerto Rico was faced with the prospect of greatly increased fuel costs; some estimates were that gasoline at some retail stations would increase by 17 cents a gallon.

One other seller of petroleum products in Puerto Rico, The Shell Company (Puerto Rico) Ltd., [Shell P.R.], also was a major purchaser from CORCO and also was subject to the reseller rule. Shell P.R. in FEA's opinion was not controlled directly or indirectly by any mainland United States refiner. Thus FEA reasoned that Shell P.R. was subject to the reseller rule and accordingly after January 15, 1974, was, like the EXXON, Mobil and Texaco subsidiaries, in a position to pass on any increased product costs directly to Puerto Rican consumers. Shell P.R. sold about 18 percent of the petroleum products consumed in Puerto Rico.

FEA, soon after the January 15, 1974 promulgation of the pricing regulations, became concerned about the effect that the application of the reseller rule would have on the Puerto Rican economy. For instance, in March 1974, Shell P.R. and Mobil Caribe attempted to increase prices by 12-14 cents per gallon. Similarly, in February, 1974, the gasoline retailers association decreed a two-day shutdown of gasoline stations to protest the petroleum problem. During that shutdown there also was a major transportation strike, causing severe dislocation in the Puerto Rican economy. FEA began to fear the emergence of a two-tiered pricing structure for fuel in Puerto Rico. FEA reasoned that those few retailers purchasing fuel that had been refined by Gulf would have low prices while the majority, those purchasing fuel refined by CORCO, would have significantly higher prices. In its submission to the FEA, the Commonwealth of Puerto Rico stated:

> The retailers with the lower prices would inevitably exhaust their inventory in the first days of the month. Those with higher prices would experience very low sales volumes during these early days, until the low cost products available on the island were exhausted.
>
> Price disparity will cause long lines at gasoline stations, which in addition to causing inconveniences to consumers, cause economic hardships to business purchasers, such as truckers and construction companies which must pay employees to wait in lines to purchase fuel.

By late March, 1974, FEA determined that action should be taken to change the reseller rule as it applied in Puerto

Rico. On March 20, 1974, FEA announced an amendment to its mandatory petroleum price regulations so that those Puerto Rican entities which are owned directly or indirectly by mainland United States refiners were to be subject to the refiner rule, not the reseller rule. FEA found good cause to make this amendment effective immediately. On the same date FEA published notice that it would hold public rule-making hearings in San Juan, Puerto Rico, on April 8 and 9 1974, for the purpose of determining whether the refiner rule, the reseller rule, or some other pricing regulation should be applied permanently to Puerto Rico. Also on the same date FEA issued a separate order to Shell P.R. requiring it to adhere to its February 22, 1974 prices pending the outcome of the rule-making proceeding. By these combined actions FEA assured that any price increases incurred by CORCO and passed on by CORCO to, *inter alia,* Mobil Caribe, ESSO, Texaco P.R. and Shell P.R., would not be passed on in full to Puerto Rican consumers. Rather, Mobil Caribe, ESSO and Texaco P.R. could pass on only such price increases as were allowed under the refiner rule, and Shell P.R. was barred from any further price increases.

FEA published its amended regulations and notice of rule-making on March 27, 1974. Pursuant to those notices many interested parties submitted comments concerning the proposed rule-making and FEA held two days of hearings on April 8 and 9, 1974. On May 20, 1974, FEA published its final mandatory petroleum price regulations applicable to Puerto Rico. *See* 39 Fed.Reg. 17764 (1974). In its first conclusion FEA determined that the refiner rule, not the reseller rule should be applied in Puerto Rico.

> The FEO [now FEA] has concluded that the refiner price rule should be applied in Puerto Rico. The fore-

most consideration in this regard is the adverse impact that the reseller rule would have on the economy of Puerto Rico.

The Emergency Petroleum Allocation Act of 1973 included Puerto Rico in the allocation and price regulation system contemplated by the Act, and the need to maintain "equitable" prices for petroleum products in Puerto Rico is particularly acute in view of the nature of the Puerto Rican economy.

Although Puerto Rico does have a semi-autonomous governmental status, the fact that it has been included in the definition of the United States under the Emergency Petroleum Allocation Act of 1973 means that the averaging of costs in Puerto Rico with costs in the mainland United States cannot properly be regarded as a subsidy, any more than the averaging of costs with respect to one state where costs are high with those of another state where costs are low can be regarded as a subsidy from one state to another.

The FEO recognizes, however, that the differing treatment of Puerto Rico under the tax laws of the United States results in subjecting increased product cost recoupment revenues to Federal corporate income taxes in the mainland United States, which would not be subject to such taxes in Puerto Rico. The FEO has concluded, however, that the public policy expressed in the Emergency Petroleum Allocation Act of 1973, together with the consistent United States policy of promoting the Puerto Rican economy, favors the conclusion reached here. The tax consequences on each marketing company will vary, depending on its tax situation, and FEO will cooperate with the affected companies in trying to resolve tax problems resulting from this decision. 39 Fed. Reg. at 17765.

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With respect to Shell P.R. FEA came to a somewhat different conclusion.

> As noted above, Shell (Puerto Rico) is not owned, directly or indirectly by a mainland United States refiner. Accordingly, it must be treated as a reseller under the price regulations and permitted to pass through its increased product costs in the form of increased prices. In order to avoid the potentially disruptive and chaotic effects in the marketplace of having one marketer with prices substantially in excess of those of the other marketers, FEO has determined that it is necessary to require CORCO to adjust its prices to Shell (Puerto Rico) downward, and to permit CORCO to make an upward adjustment in the prices it charges to its other customers, so that it will continue to obtain a dollar-for-dollar pass through of its increased product costs. *Id.*

II. Procedural Background

Subsequent to issuance of the above-noted regulation, CORCO, as required by the regulation, sought from ESSO, Mobil Caribe, and Texaco P.R. certain information so that it could figure according to a complex FEA formula the amount by which CORCO would have to reduce its price to Shell. Despite the use of the word "permit" with regard to the Shell adjustment, both CORCO and FEA took the position from the beginning that the rule was mandatory in its terms: CORCO was required to lower its prices to Shell and if it raised its prices to ESSO, Mobil Caribe and Texaco P.R. in order to compensate for the Shell re-

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duction, ESSO, Mobil Caribe and Texaco P.R. were required to accept and pay those higher prices.

After the May 20, 1974 publication of the Puerto Rican price regulations, Mobil Caribe, ESSO and Texaco P.R. all observed the refiner rule. Texaco on June 25, 1974, appealed to FEA to set aside the May 20 price regulation; neither Mobil Caribe or ESSO challenged the price regulation at that time. In Summer, 1974, CORCO sent Mobil Caribe and ESSO invoices reflecting the amount they owed CORCO for the Shell adjustment. Both Mobil Caribe and ESSO refused to pay these invoices, contending that the Shell adjustment was invalid. On August 27, 1974, FEA served EXXON and ESSO with a notice of probable violation of the May 20, 1974 regulation. After considerable consultation, FEA issued a remedial order against EXXON and ESSO on October 9, 1974, and, after denying a stay pending appeal, finally rejected EXXON and ESSO's appeal on November 14, 1974. Similarly, Mobil and Mobil Caribe received notice of probable violation on September 3, 1974, and after proceedings similar to those experienced by EXXON and ESSO, finally were denied an appeal on November 19, 1974.[1] Texaco never received a notice of probable violation but its appeal of the May 20, 1974 regulation finally was denied on November 26, 1974.

EXXON and ESSO commenced Civil Action 74-1617 on November 7, 1974, seeking injunctive and declaratory re-

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[1] Questions have been raised, particularly by Mobil and Mobil Caribe, whether the corporate parents were properly made parties by FEA in the notices of probable violation. Under FEA regulations the parent and the subsidiary constitute part of the same firm and thus the court agrees with FEA that both parent and subsidiary could be noticed for probable violation although only the subsidiary dealt directly with CORCO.

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lief that the Shell adjustment of the May 20, 1974 regulation was invalid and that the remedial order and denial of an intra-agency appeal were unsupported by any valid regulation. They moved for a temporary restraining order which was heard and granted on November 15, 1974. In Civil Action 74-1658 Mobil and Mobil Caribe commenced suit on November 14, 1974, seeking not only relief similar to that in Civil Action 74-1617 but also attacking the application of the refiner rule to Puerto Rican subsidiaries of mainland United States oil corporations. They moved for a temporary restraining order which was heard and granted on November 15, 1974. In Civil Action 74-1705 Texaco and Texaco P.R. commenced suit on November 22, 1974, attacking the validity of the Shell adjustment. A temporary restraining order was entered on November 22, 1974.

In each of the three cases presently before the court the parties stipulated to continuation of the temporary restraining orders and set up a briefing schedule for cross-motions for summary judgment. In each of the cases CORCO sought and was granted intervention. Similarly, in each case the United States of America was allowed to intervene solely for the purpose of asserting a counterclaim that the respective defendants be ordered to pay the sums allegedly due to CORCO. The Commonwealth of Puerto Rico intervened only in Civil Action 74-1658. All the parties, including the intervenors, have filed motions for summary judgment and there has been extensive briefing of all issues. In addition, the court heard three hours of oral argument on the various motions. The court finds that there exists no genuine issue as to any material fact and accordingly that these cases are ripe for decision on summary judgment.

III. Merits of Plaintiffs' Claims

As stated earlier in this Opinion, plaintiffs' challenges fall into two broad categories: first, those challenging the substantive validity of the Puerto Rican price regulation and, second, those challenging the procedures by which that regulation was promulgated. The court first will address the substantive challenges.

A. Substantive Challenges to Puerto Rican Price Regulations

Before addressing the challenges in detail, the court first shall set forth the scope of judicial review when parties challenge an FEA regulation. Under section 211(d)(1) of the Economic Stabilization Act of 1970 "no regulation . . . shall be enjoined or set aside . . . unless a final judgment determines that the issuance of such regulation was in excess of the agency's authority, was arbitrary or capricious, or was otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code . . . ." In determining whether agency action is arbitrary or capricious, the courts must review the agency record for its decision. The Temporary Emergency Court of Appeals in *Pacific Coast Meat Jobbers Association, Inc.* v. *Cost of Living Council,* 481 F.2d 1388, 1391 (Em.App. 1973), set forth the proper judicial review as follows:

> In order for this court to affirm the C.L.C. action and the court below, it is not necessary that we decide that the C.L.C.'s action was:
>
> > . . . the only reasonable [method], or even that this Court would have reached the same result if the question had arisen in the first instance in judicial proceedings. . . .

> In a case such as this the 'judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.' (citations omitted).

And the Supreme Court recently has explained the scope of review to be performed:

> Under the 'arbitrary and capricious' standard the scope of review is a narrow one. A reviewing court must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.' The agency must articulate a 'rational connection between the facts found and the choice made.' While we may not supply a reasoned basis for the agency's action that the agency itself has not given, we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 95 S.Ct. 438, 442, 42 L.Ed.2d 447 (1974) (citations omitted).

With the foregoing as background, the court now will address plaintiffs' substantive challenges.

(1) *Challenge to Application of Refiner Rule to Puerto Rican Entities of United States Refiners.*

Mobil and Mobil Caribe challenge FEA's determination to apply the amended reseller rule (meaning the refiner

rule) to Puerto Rican entities which are controlled directly or indirectly by mainland United States refiners. The FEA's purpose in applying the refiner rule to these entities is set forth with clarity in the May 20, 1975 regulation. The FEA, after holding hearings and considering comments, concluded that application of the reseller rule in Puerto Rico would have had a severe adverse impact on the Puerto Rican economy, particularly because of threatened inequitable prices. The hearings and written submissions to the FEA set forth in great detail these adverse impacts and the court properly can consider this record in determining whether there exists a rational basis for the FEA decision. *See* 5 U.S.C. § 706 (1970). Primarily, FEA was acting to prevent what it considered inequitable prices which would result in Puerto Rico if CORCO's full product increases were passed on solely within the Puerto Rican market. FEA action to assure equitable prices is squarely within Congress' mandate. *See* 15 U.S.C. § 753(b)(1)(F) (Supp.1975). FEA acted to assure that the effect of the high price of foreign crude oil would be borne not solely by the Puerto Rican economy but rather that, in conformance with the requirements of the Petroleum Act, petroleum products be distributed at equitable prices "among all regions and areas of the United States . . . ." *Id.* There is ample evidence in the record for FEA to conclude that if Puerto Rico were to bear the full brunt of price increases, there would be severe disruption of the Puerto Rican economy. Already in early 1974 there had been strikes protesting higher petroleum costs. It was clear that for Puerto Rico, 99 percent dependent on petroleum for all of its energy needs, to face huge price increases would have had severe impact on wide branches of Puerto Rico's commercial existence. The court

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concludes that FEA was correct in acting to avert this type of problem, one clearly within Congress' mandate to the Executive. There may have been other means by which this problem could have been attacked but this court finds that the one chosen by FEA was a reasonable one for which a rational basis exists. *See Pacific Coast Meat Jobbers Ass'n* v. *Cost of Living Council, supra* at 1391.

Mobil and Mobil Caribe also raise a second challenge to the amended reseller rule. Under the Petroleum Act, while FEA is directed to regulate allocation and prices, 15 U.S.C. § 753(a) (Supp. 1975), FEA, in specifying the prices for petroleum products, must also "provide for . . . a dollar-for-dollar passthrough of net increases in the cost of crude oil . . . to all marketers or distributors at the retail level . . . ." 15 U.S.C. § 753(b)(2)(A) (Supp.1975). Mobil and Mobil Caribe assert that the amended reseller rule violates the dollar-for-dollar passthrough provision for several reasons. First, Mobil Caribe does not get the full benefit of the dollar-for-dollar passthrough; rather that must be shared with its parent, Mobil Corporation. Second, Mobil asserts that the passthrough is not effective because prices in the United States are so high that Mobil has been unable to pass through the additional price increases reflected by the Puerto Rican price rules. Third, since Mobil Caribe is a Panamanian corporation, the amended reseller rule has adverse tax effects. Mobil and Mobil Caribe cannot, under United States tax laws, file consolidated tax returns. This means that when and if Mobil finally is able to pass on the increased product costs incurred by Mobil Caribe, these increased prices shall constitute profit by Mobil, fully subject to United States income taxes. The court is unpersuaded by any of these arguments. First, under FEA rules, Mobil and Mobil Caribe can be considered the same firm.

See 10 C.F.R. §§ 212.31, 212.83(b). Under these definitions of firms Mobil Caribe is getting the effect of the dollar-for-dollar passthrough when its parent passes on increased costs because Mobil and Mobil Caribe constitute the same firm. Second, the court is unconvinced that Mobil is unable to pass through the increased costs. Certainly, it may have been unable to do so thus far, but that does not mean that in the future it will be unable to do so. Further, the court agrees with FEA that the Act requires only that FEA provide a reasonable mechanism for this passthrough. The Act does not require that FEA guarantee the effectiveness of the passthrough. *See Gulf Oil Corp.* v. *F. E. A.*, 391 F.Supp. 856 (W.D.Pa.1975), *appeal pending*, No. 3-6 (T.E.C.A.1975). This agency interpretation of the Petroleum Act, appearing reasonable, is entitled to great deference. *University of So. Cal.* v. *Cost of Living Council*, 472 F.2d 1065, 1068-69 (Em.App.1972), *cert. denied*, 410 U.S. 928, 93 S.Ct. 1364, 35 L.Ed.2d 590 (1973). The court finds that the passthrough mechanism provided by FEA in the instant situation is reasonable and fully implements the Act's provisions. Finally, the court finds no merit in plaintiffs' claims that the passthrough provision violates the Act because it places Mobil and Mobil Caribe in a less favorable tax situation. Nothing in the Act requires that FEA pricing regulations assure favorable tax consequences to firms subject to FEA regulation. The Act only requires that FEA provide for a dollar-for-dollar passthrough of net increases in the cost of petroleum products.[2]

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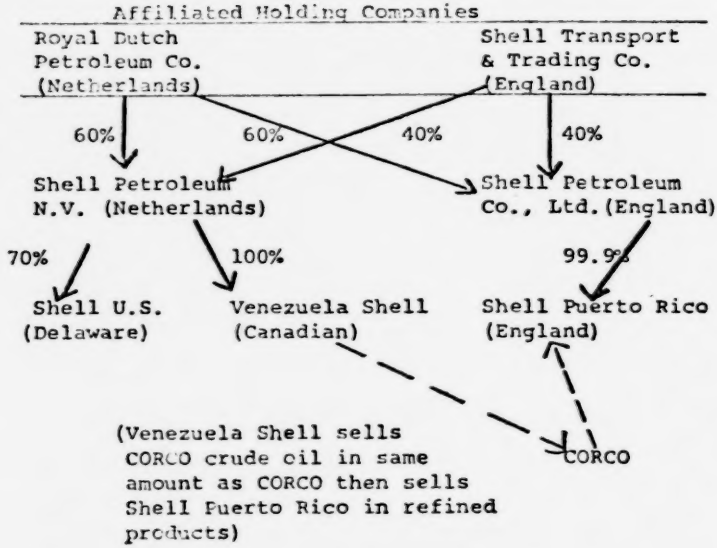
[2] In light of the foregoing findings and conclusions that the FEA amendment of the reseller rule has a rational basis and is fully in accord with the Petroleum Act, the court rejects as insubstantial plaintiffs' arguments that the reseller amendment constitutes a taking without just compensation. *See Delaware Valley Apt. House Owners Ass'n* v. *United States*, 350 F.Supp. 1144, 1149-50 (E.D. Pa.), *aff'd per curiam*, 482 F.2d 1400 (Em.App., 1973).

(2) *Challenges to the Shell Differential.*

All plaintiffs in the three suits under advisement vigorously attack what has been termed the "Shell differential" or "Shell subsidy" provision of the FEA's mandatory pricing regulation. Generally speaking these challenges are three-fold: whether FEA was correct in concluding that Shell had to be treated as a reseller; whether the Shell differential as it pertained to plaintiffs in this case was mandatory or permissive and was meant to override preexisting contracts; and whether the Shell differential was within the FEA's authority and is supported by a rational basis.

(a) *Whether Shell had to be treated as a Reseller.*

In its May 20, 1974 regulation FEA states that since Shell Puerto Rico is not owned directly or indirectly by a mainland United States refiner, "it must be treated as a reseller under the price regulations and [be] permitted to pass through its increased product costs in the form of increased prices." Plaintiffs challenge this legal conclusion. To resolve this controversy the court must examine FEA's complex definitions regarding what constitutes a firm. However, first the court considers it helpful to set forth a diagram showing, at least in relevant part, the corporate structure of the affiliated Shell companies. The percentages shown on this diagram constitute the percentage of ownership that the top company owns over the company at the end of a particular arrow.



From this diagram it is clear that Shell U.S. and Shell P.R. both are controlled directly by a commonly-held group of parents. If these parents were United States corporations, no doubt FEA would have concluded that Shell P.R. had to be treated under the refiner rule. The question then arises whether under FEA regulations it was proper for FEA to conclude that because of the parents' foreign ownership, Shell P.R. properly was classified as a reseller.

Although the May 20, 1974 regulation lacks somewhat in clarity, the court is able to perceive how FEA arrived at its conclusion that Shell P.R. had to be classified as a reseller. FEA's regulations pertaining to allocation of a refiner's increased product costs define firm as a "parent and the consolidated and unconsolidated entities (if any) which it directly or indirectly controls." 10 C.F.R. § 212.83(b). Referring to this definition of firm, FEA then concludes

"that Shell P.R. must be controlled directly or indirectly by Shell U.S. before it could be brought within the scope of the refiner pricing rule for the purpose of requiring Shell U.S. to average in the increased costs." Supplemental Brief of the Federal Defendants at 4, filed March 27, 1975. The court, though somewhat uncertain about how FEA defines "indirect control," is willing to accept that Shell U.S. does not control Shell P.R. either directly or indirectly. Thus, unless FEA's interpretation or application of its regulations is otherwise improper, FEA's decision to apply the reseller rule to Shell P.R. is correct.

One premise underlying FEA's application of its regulations to Shell P.R. merits further discussion. FEA, in deciding whether Shell P.R. could, similarly to Mobil Caribe, Texaco P.R., and ESSO, be subjected to the refiner rule, looked to see whether Shell P.R. was controlled directly or indirectly by a mainland United States refiner. Such a view is not absolutely required. FEA's regulations in 10 C.F.R. § 212.83(b) declare that a firm means a parent and the consolidated and unconsolidated entities which it directly or indirectly controls. The regulation does not state that the parent need be a United States mainland corporation. From the diagram set forth earlier it is clear that under FEA's definition of parent, 10 C.F.R. § 212.31, Royal Dutch Petroleum Company is the "parent" of both Shell U.S. and Shell P.R. Since Royal Dutch Petroleum Company is the parent, both Shell U.S. and Shell P.R. appear to be entities which it directly or indirectly controls. Thus, under FEA's regulations regarding the allocation of a refiner's increased product costs, Royal Dutch Petroleum, Shell U.S., and Shell P.R. are part of the same firm and increased costs could be allocated between all of them.

FEA perhaps does not have jurisdiction to force Royal Dutch Petroleum to participate in such an allocation scheme. However, that does not limit FEA, once it determines that Shell P.R. and Shell U.S. are part of the same firm, from ordering those parts of the firm over which FEA has jurisdiction to average costs according to the refiner rule. At oral hearing the government attorney took the position that for FEA to subject Shell P.R. to the refiner rule and to order it to average cost increases with Shell U.S. would have required FEA to exercise control over a foreign corporation. (Tr. 82). However, FEA could look to the foreign structure to determine what constituted a "firm" and then regulate the American parts of that firm according to economic reality. In other situations FEA or its predecessor has looked to a foreign corporation in order to determine the true relationship of American parts of that firm. *See* CLC Ruling 1972-82. Indeed, after questioning by the court, government counsel had to admit that Shell P.R. and Shell U.S. could have been treated together under the refiner rule. (Tr. 90).

Despite the preceding, FEA interpreted its regulations differently. For purposes of application of the refiner rule, FEA decided that "parent" must be a United States corporation. FEA persists in this interpretation even though the regulations themselves do not require expressly that the parent be American. The court is of the opinion that the agency interpretation of the statute and its regulations does represent a rational exercise of the powers delegated to it, and that there has been no clear error of judgment. That agency interpretation is not the only rational decision it could have reached and indeed does not necessarily reflect the choice this court would have reached if the court were charged with the initial decision. However, the Temporary

Emergency Court of Appeals has cautioned that FEA is to be accorded great deference in its efforts to enforce and implement the Emergency Petroleum Allocation Act. Under these circumstances the court rules that the agency justifiably could conclude that under the Petroleum Act and its regulations Shell had to be treated under the reseller rule.

(b) *Whether the Shell differential is Mandatory as Regards CORCO's Customers other than Shell.*

The amended reseller price regulation requires CORCO to reduce its price to Shell P.R. according to a formula and permits "CORCO to make an upward adjustment in the prices it charges to its other customers, so that it will continue to obtain a dollar-for-dollar passthrough of its increased product costs." FEA has interpreted this language to mean that even though certain parties had preexisting contracts with CORCO calling for prices below the price under the original reseller rule, the amended reseller rule overrode those pre-existing contracts, requiring plaintiffs to pay higher prices reflecting the Shell differential. Two basic challenges are raised by plaintiffs: first, by using the word "permits" FEA allowed CORCO to raise its prices if it wanted to but did not require it to and did not require plaintiffs to accept such higher prices; and second, since the regulation did not specifically override pre-existing contracts calling for a lower price than the FEA price, the pre-existing contracts remain in effect.

It is clear that Congress intended that pre-existing contracts remain in effect under the Petroleum Act to the maximum extent practicable. "FEO regulations preempt or override contracts only to the extent that compliance with

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existing contracts would constitute a violation of the mandatory pricing regulations." *Trans World Airlines, Inc.* v. *FEO,* 380 F.Supp. 560, 566 (D.D.C.1974). However, in this case FEA consistently has interpreted the regulation to override pre-existing contracts and price arrangements so that CORCO could obtain its dollar-for-dollar passthrough to the extent of the Shell differential. FEA, via interpretation of its regulation, determined that such overriding of existing contracts to that limited extent was necessary under the Petroleum Act. FEA's interpretation of its own regulation is due considerable deference and should not be disturbed if that interpretation is a reasonable one. *University of So. Cal.* v. *CLC, supra* at 1068-69. The court concludes that FEA need not specifically refer to existing contracts when the regulation in question, by its terms, provides that existing contracts necessarily must be overridden. In this case, the terms of the regulation, upon reasonable interpretation, do provide for overriding the preexisting contracts which Esso and Texaco P.R. had with CORCO. The court concludes also that the regulation reasonably intends that any company doing business with CORCO pay its pro rata share of the Shell differential. Since CORCO was required to reduce its price to Shell, it followed logically, in order to implement the passthrough provisions, that it be able to raise its prices to its other customers who, in turn, could pass through those increased prices via the refiner rule.

The court finds it unnecessary to consider whether under FEA's interpretation, FEA could have required ESSO and Texaco P.R. to continue to buy from CORCO at a higher price. However, there is recent precedent which indicates that FEA probably has such authority. *See Condor Operating Co.* v. *Sawhill,* 514 F.2d 351, 360 (Em.App., Feb. 7,

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1975), *cert. denied,* 421 U.S. 976, 95 S.Ct. 1975, 44 L.Ed.2d 467 (1975); *Gulf Oil Corp.* v. *Simon,* 502 F.2d 1154 (Emp. App., 1974).

(c) *Whether the Shell differential Constitutes Arbitrary and Capricious Agency Action.*

All parties attack the Shell differential, asserting that it is beyond agency authority and that it has no rational basis. To the extent that these attacks focus upon difficulty for plaintiffs in obtaining a cost passthrough and upon the unfavorable tax consequences, the court deems the previous discussion of these matters to apply as well to the challenges under the Shell differential. A more serious problem arises, however, with regard to the agency's determination that "to avoid the potentially disruptive and chaotic effects in the marketplace of having one marketer with prices substantially in excess of those of the other marketers. . . .", the Shell differential would be imposed.

It is first argued by plaintiffs that FEA has no authority to promulgate a regulation designed to avoid potential disruption in the marketplace. However, from the Petroleum Act itself, both in Congress' findings, 15 U.S.C. § 751(a) (Supp.1975), and in the goals FEA is told to accomplish to the maximum extent practicable, 15 U.S.C. § 753(b)(1) (Supp.1975), the court concludes that it is within FEA's mandate to seek to avoid market disruption directly related to the petroleum crisis. Any such narrow reading of the Act as plaintiffs would urge would unduly hamper FEA in seeking to carry out Congress' mandate.

Plaintiffs also argue that there is no rational basis for FEA's determination that the Shell differential was necessary in order to avoid the potential chaos of having one

marketer with prices substantially in excess of those of other marketers. Plaintiffs argue that even if Shell remained subject to the reseller rule while plaintiffs labored under the refiner rule, the Shell differential was unnecessary because, as a matter of simple economics, Shell would have been unable to raise prices significantly without losing all its business. The court has examined with care the record of these proceedings but is hesitant to substitute its judgment for that of the agency, particularly where complex economic decisions had to be made. The record does indicate that most witnesses did say that it would be impossible for one marketer to remain in the market if all other marketers had significantly lower prices. However, it is apparent from the regulation itself and the complete record of these proceedings, that FEA was not convinced that Shell P.R. could not hold its prices significantly above those of the other marketers. FEA had observed previously the effort of Shell P.R. and Mobil Caribe to raise prices significantly and obviously was worried that similar efforts might be tried by Shell P.R. alone. Even if ultimately unsuccessful, FEA could reason that in the interim such a two-tiered price system might be chaotic for Puerto Rico. The court emphasizes that in its review of this agency action it need not find that the Shell differential was the only or indeed the most sensible solution to what FEA perceived to be a problem. This court need not even agree with FEA that the Shell situation did constitute a problem. Rather, as stated in *Pacific Coast Meat Jobbers Ass'n* v. *C.L.C., supra,* the judicial function ends when the court finds a rational basis for the agency action. And this rational basis is not nullified even if it ultimately is decided that a particular agency action was incorrect. *Mandel* v.

Simon, 493 F.2d 1239, 1240 (Em.App.1974). In a similar situation TECA has stated:

> The record demonstrates that CLC had a rational basis for its decision, although it may have made mistakes in predicting economic trends. Mere error in judgment does not destroy the fact that there was a reasonable basis for the decision, and its continuance until September 12, 1973, in view of the short period of time involved and the rapidly changing conditions.

Western States Meat Packers Ass'n, Inc. v. *Dunlop*, 482 F.2d 1401, 1406 (Em. App. 1973). The court concludes that there exists a rational basis for FEA's decision to impose the Shell differential and that the differential is within the broad regulatory authority conferred upon the agency.[3]

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[3] In the cross-motions for summary judgment there was much argument by plaintiffs that defendants were trying to offer post-hoc rationalizations for the Shell differential. FEA and the other defendants have suggested as part of the chaos feared by FEA was that Shell P.R., unable to charge higher prices because of competition from plaintiffs, would have decided to leave the market, leaving some 270 branded independent marketers without supply. Plaintiffs argue vigorously that since the May 20 regulation talked only of the danger of a two-tiered price system, the court cannot consider the financial danger to Shell and the retailers as a basis for the regulation. First, the court feels that the rule may be sustained even without reference to the dangers to Shell. However, the court also feels that plaintiffs read the language of the regulation too narrowly. Part of the chaos of a two-tiered price system was the financial danger to Shell and the consequent injury to Puerto Rico retailers. There is extensive evidence in the record sustaining such danger. Such material is part of the agency record. *See Rodway* v. *United States Department of Agriculture*, 514 F.2d 809 (D.C.Cir. 1975). Thus, the court finds that FEA is not offering new reasons for the regulation but is merely explaining the stated reason. While the stated reason is somewhat lacking in clarity, the court on review of the entire record can discern the agency's path. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight Sys., Inc., supra.*

Similarly, there exists no violation of due process and no taking of property in violation of the fifth amendment. *See Condor Operating Co. v. Sawhill, supra.*

B. *Procedural Challenges to Puerto Rican Price Regulation.*

There are two principal procedural challenges to FEA's action and both deal with the Shell differential. First, all plaintiffs assert that there was inadequate notice of the Shell differential and thus that portion of the regulation must be set aside. Second, Mobil and Mobil Caribe assert that even if there was proper notice of the Shell differential, it was not effective for 30 days by which time Mobil Caribe had ceased doing any business with CORCO. Thus, Mobil and Mobil Caribe assert on this second point that they owe no money to CORCO.

(1) *Notice of Shell Differential*

Under 5 U.S.C. § 553(b)(3) (1970), FEA, when giving notice of proposed rule-making, must *inter alia,* state "either the terms or substance of the proposed rule or a description of the subjects and issues involved." An agency can omit this requirement only for interpretative rules, general statements of policy, rules of agency organization, procedure or practice, or when it finds good cause for making a regulation effective immediately. In March 1974 FEA made the refiner rule temporarily effective in Puerto Rico and announced that it would hold rule-making to decide whether "Puerto Rican subsidiaries of refiners should be considered as refiners, as resellers, or should be subject to some other form of price regulation." 39 Fed.Reg. 10454 (March 20, 1974). Interested parties were asked to submit

comments and to participate in the hearings. Comments were elicited about corporate structure, historical relations between Puerto Rican entities and their parents, and other factors. *See id.* at 10455. There was nothing in the notice stating that any particular treatment regarding Shell was contemplated. Indeed, under FEA's interpretation, Shell was not considered the "subsidiary of a refiner" and thus the rule-making notice seems on its face to preclude any consideration whatsoever of Shell. Defendants argue that FEA, by stating "some other form of price regulation" gave proper notice of the Shell differential. The court, although mindful that TECA has not required absolute technical compliance by FEA with many requirements of the Administrative Procedure Act, cannot agree with defendants. The notice of March 20, 1974, simply fails to indicate that Shell P.R. even was going to be considered at the hearing. *See* ***Rodway*** v. ***United States Department of Agriculture, supra.***

Defendants assert that even if the rule-making notice was inadequate, plaintiffs received actual notice at the hearing which obviates the lack of the other notice. *See* 5 U.S.C. § 553(b) (1970). At the hearing it became obvious that FEA was concerned with the peculiar position of Shell P.R. and the FEA hearing officer on a number of occasions questioned witnesses as to how Shell P.R. could be handled. At one point Mr. Wilson asked in very clear terms whether something along the lines of the Shell differential should be imposed. He said:

> The second alternative was to have CORCO lower its prices to Shell in relation to the prices charged to other companies, in effect spreading the price, the

> increased cost, through the other companies through their U.S. Operations. (Tr. Vol. 2, 19-20).

See also, Vol 1, at 28. It appears to the court that at the hearings themselves it should have been obvious to all participants that FEA was extremely concerned about how to handle the pricing of petroleum products by Shell P.R. Indeed, at various times the prospect of the Shell differential was brought up very explicitly. The court concludes that this constitutes actual notice of the subjects and issues involved. Certainly, it would have been better if FEA had given explicit prior notice but it is likely that FEA did not know until the hearing or shortly before it that Shell P.R. would present such a special case. At the hearing FEA did raise the problem repeatedly and, in this court's opinion, sufficiently to meet the requirements of *California* v. *Simon,* 504 F.2d 430, 440 (Em.App.1974), *cert. denied,* 419 U.S. 1021, 95 S.Ct. 496, 42 L.Ed.2d 294 (1974).

> [T]he procedure in question from the standpoint of substantial statutory compliance, fairness, circumspection, prior notice, opportunity to be heard and abundant record justification, against the background of an embryonic agency faced with complicated takeover tasks under a Congressional deadline, was such as to properly render such mere technical objection unavailing. (footnotes omitted).

This court feels that under all of the circumstances, the imposition of the Shell differential was done fairly. Plaintiffs argue that they should have had an opportunity to point out the irrationality of FEA's decision but given the narrow time schedule involved, the court can understand

that FEA in early 1974 was doing the best job it could. TECA has cautioned recently that with regard to future procedural matters, FEA will be required to comply fully with the requirements of the APA. *See Nader* v. *Sawhill*, 514 F.2d 1064, 1069 (Emp.App.1974). However, TECA nevertheless has continued to allow considerable leeway in reviewing FEA action taken under the Petroleum Act soon after its enactment. This is such a case. Under all the circumstances, plaintiffs did receive adequate actual notice of the Shell differential and, accordingly, the regulation is not defective in that regard.

(2) *Effective Date of Regulation.*

Mobil and Mobil Caribe argue that because the May 20, 1974 regulation did not explicitly state that good cause existed to make the regulation effective immediately, the regulation was not effective until June 20, 1974, by which time Mobil Caribe no longer did any business with CORCO. This position must be rejected. In the March 20, 1974 temporary regulation and the notice of rule-making FEA had found good cause to make the regulation effective immediately. While the language of the May 20, 1974 regulation did not make a similar finding, by its terms the regulation required immediate action by the parties. The court concludes that from the findings in the regulation itself the good cause for immediate effectiveness is obvious and that the terms required immediate effectiveness. *See generally California* v. *Simon, supra; DeRieux* v. *Five Smiths, Inc.*, 499 F.2d 1321 (Em.App.), *cert. denied*, 419 U.S. 896, 95 S.Ct. 176, 42 L.Ed.2d 141 (1974).

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IV. Conclusion

These cases have involved many complex substantive and procedural issues, the outcome of which involved very close decisions in certain cases. The court has concluded that in each case summary judgment must be granted for defendants and denied for plaintiffs. Further, the court finds no credible evidence that CORCO failed to comply with FEA regulations and thus concludes that in each case the court should order payment by plaintiffs of the amounts due to CORCO for the Shell differential. The court will enter judgment in the amounts shown to be due by the latest FEA audit. Appropriate judgments accompany this Memorandum Opinion.

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UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

Civ. A. No. 74-1705

TEXACO, INC., and TEXACO PUERTO RICO, INC.,

Plaintiffs,

v.

FEDERAL ENERGY ADMINISTRATION, *et al.*,

Defendants.

AMENDED JUDGMENT

This matter came before the Court on Defendants' and Intervenor-Defendants' motions to amend the judgment awarded herein on June 17, 1975, and Plaintiffs' opposition thereto. After consideration of the memoranda, submitted by counsel, it is by the Court this 23rd day of July, 1975,

ORDERED, ADJUDGED and DECREED that the judgments herein entered are hereby amended; and it is further

ORDERED, ADJUDGED and DECREED that plaintiffs' motion for summary judgment be, and the same hereby is, denied; and it is further

ORDERED, ADJUDGED and DECREED that Defendants' and Intervenor-Defendants' motions for summary judgment be, and the same hereby are, granted; and it is further

ORDERED, ADJUDGED and DECREED that judgment be entered for Defendants and Intervening Defendants; and it is further

ORDERED, ADJUDGED and DECREED that plaintiffs pay to Commonwealth Oil Refining Company, Inc. the sum of $999,216.27; and it is further

ORDERED, ADJUDGED and DECREED that plaintiffs shall pay to Commonwealth Oil Refining Company, Inc. interest on the judgment amount of $999,216.27, as follows:

(a) Commencing October 28, 1974, interest be awarded to Commonwealth Oil Refining Company, Inc. at the rate of six percent (6%) per annum on the principal amount of $83,363.93, and

(b) Commencing November 16, 1974, interest be awarded to Commonwealth Oil Refining Company, Inc. at the rate of six percent (6%) per annum on the principal amount of $98,559.90 and

(c) Commencing December 15, 1974, interest be awarded to Commonwealth Oil Refining Company, Inc. at the rate of six percent (6%) per annum on the principal amount of $817,292.44 and it is further

ORDERED, ADJUDGED and DECREED that each party shall bear its own court costs.

THOMAS A. FLANNERY
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

Civ. A. No. 74-1658

MOBIL OIL CORPORATION and
MOBIL OIL CARIBE, INC.,

Plaintiffs,

v.

FEDERAL ENERGY ADMINISTRATION, *et al.*,

Defendants.

AMENDED JUDGMENT

This matter came before the Court on Defendants' and Intervenor-Defendants' motions to amend the judgment awarded herein on June 17, 1975, and Plaintiffs' opposition thereto. After consideration of the memoranda, submitted by counsel, it is by the Court this 23rd day of July, 1975,

ORDERED, ADJUDGED and DECREED that the judgments herein entered are hereby amended; and it is further

ORDERED, ADJUDGED and DECREED that plaintiffs' motion for summary judgment be, and the same hereby is, denied; and it is further

ORDERED, ADJUDGED and DECREED that the Defendants' and Intervenor-Defendants' motions for summary judgment be, and the same hereby are, granted; and it is further

ORDERED, ADJUDGED and DECREED that judgment be entered for Defendants and Intervenor-Defendants; and it is further

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ORDERED, ADJUDGED and DECREED that plaintiffs pay to Commonwealth Oil Refining Company, Inc. the sum of $629,601.46; and it is further

ORDERED, ADJUDGED and DECREED that plaintiffs pay to Commonwealth Oil Refining Company, Inc. interest on the judgment amount of $629,601.46 as follows:

(a) Commencing August 1, 1974, interest be awarded to Commonwealth Oil Refining Company, Inc. at the rate of six percent (6%) per annum on the principal amount of $255,711.65 and

(b) Commencing August 13, 1974, interest be awarded to Commonwealth Oil Refining Company, Inc. at the rate of six percent (6%) per annum on the principal amount of $373,889.81; and it is further

ORDERED, ADJUDGED and DECREED that each party shall bear its own court costs.

THOMAS A. FLANNERY
United States District Judge

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UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

Civ. A. No. 74-1617

EXXON CORPORATION and ESSO STANDARD OIL S.A., LTD.,

Plaintiffs,

v.

FEDERAL ENERGY ADMINISTRATION, *et al.*,

Defendants.

AMENDED JUDGMENT

This matter came before the Court on Defendants' and Intervenor-Defendants' motions to amend the judgment awarded herein on June 17, 1975, and Plaintiffs' opposition thereto. After consideration of the memoranda, submitted by counsel, it is by the Court this 23rd day of July, 1975,

ORDERED, ADJUDGED and DECREED that the judgments herein entered are hereby amended; and it is further

ORDERED, ADJUDGED and DECREED that plaintiffs' motion for summary judgment be, and the same hereby is, denied; and it is further

ORDERED, ADJUDGED and DECREED that the Defendants' and Intervening Defendants' motions for summary judgment be, and the same hereby are, granted; and it is further

ORDERED, ADJUDGED and DECREED that judgment be entered for Defendants and Intervening Defendants; and it is further

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ORDERED, ADJUDGED and DECREED that plaintiffs pay to Commonwealth Oil Refining Company the sum of $6,885,482.34; and it is further

ORDERED, ADJUDGED and DECREED that plaintiffs shall pay to Commonwealth Oil Refining Company interest on the judgment amount of $6,885,482.34, as follows:

(a) Commencing August 1, 1974, interest be awarded to Commonwealth Oil Refining Company, Inc. at the rate of six percent (6%) per annum on the principal amount of $1,405,816.78, and

(b) Commencing August 13, 1974, interest be awarded to Commonwealth Oil Refining Company, Inc. at the rate of six percent (6%) per annum on the principal amount of $1,387,829.17 and

(c) Commencing October 28, 1974, interest be awarded to Commonwealth Oil Refining Company, Inc. at the rate of six percent (6%) per annum on the principal amount of $2,005,514.15 and

(d) Commencing November 16, 1974, interest be awarded to Commonwealth Oil Refining Company, Inc. at the rate of six percent (6%) per annum on the principal amount of $1,145,632.59 and

(e) Commencing December 15, 1974, interest be awarded to Commonwealth Oil Refining Company, Inc. at the rate of six percent (6%) per annum on the principal amount of $940,689.65; and it is further

ORDERED, ADJUDGED and DECREED that each party shall bear its own court courts.

THOMAS A. FLANNERY
United States District Judge

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IN THE

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Nos. DC-35, DC-36 and DC-37

TEXACO, INC., TEXACO PUERTO RICO, INC., MOBIL OIL CORPORATION, MOBIL OIL CARIBE, INC., EXXON CORPORATION, and ESSO STANDARD OIL S.A., LIMITED,

Plaintiffs-Appellants,

v.

FEDERAL ENERGY ADMINISTRATION, *et al.*,

Defendants-Appellees,

UNITED STATES OF AMERICA, COMMONWEALTH OIL REFINING COMPANY and COMMONWEALTH OF PUERTO RICO,

Intervenor-Appellees.

February 9, 1976

Before:

CARTER, CHRISTENSEN and JOHNSON,

Judges.

CHRISTENSEN, *Judge*:

These three cases were considered together in the district court and there decided by separate judgments.[1] Now consolidated for the purposes of this appeal, all involve basi-

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[1] *Exxon Corporation, et al.* v. *Federal Energy Admin.*, 398 F. Supp. 865 (D. D. C. 1975).

cally the same question: whether a mandatory regulation[2] governing the pricing of petroleum products in Puerto Rico, particularly the exemption of The Shell Company (Puerto Rico) Ltd. [hereinafter Shell, P. R.] from the "refiner" rule and the ordering of related cost-equalization relief against appellants, is invalid, or was for a period ineffective, by reason of procedural or substantive defects.

The district court by summary judgment upheld the regulation and granted implementing money judgments in favor of intervenor-appellee Commonwealth Oil Refining Company, Inc. [CORCO], on its counterclaims and those of the United States on its behalf.[3] We affirm the decision of the district court.

Factual Background

The plaintiffs-appellants are three major oil companies doing business throughout the United States, together with their respective subsidiaries which market petroleum products in Puerto Rico. Puerto Rico, being specifically included within the definition of "the United States" in the Emergency Petroleum Allocation Act of 1973, was within

[2] The regulation in question was issued by the Federal Energy Office, now the Federal Energy Administration (FEA), under The Emergency Petroleum Allocation Act of 1973, 15 U. S. C. § 751 et seq. (Supp. 1975). The Federal Energy Office became the Federal Energy Administration on June 27, 1974, pursuant to the Federal Energy Administration Act of 1974, 15 U. S. C. § 761 (Supp. 1975). References to FEA hereinafter will include FEO during the corresponding time interval.

[3] The United States intervened in the district court for the purpose of interposing counterclaims that the respective defendants be ordered to pay sums allegedly due to CORCO, on which there was awarded by the district court a total of approximately $8.5 million with interest.

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the compass of the Congressional mandate that the President should promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil and its refined petroleum products in amounts and at prices specified in (or determined in a manner prescribed by) such regulation. 15 U. S. C. § 753(a) (Supp. 1975). Such regulation, "to the maximum extent practicable" was to provide for enumerated objectives, including the "preservation of an economically sound and competitive petroleum industry" to "preserve the competitive viability of . . . branded independent marketers"; the equitable distribution of refined petroleum products "at equitable prices among all regions and areas of the United States and sectors of the petroleum industry"; and the "minimization of economic distortion, inflexibility, and unnecessary interference with market mechanism." 15 U. S. C. § 753(b)(1). There was to be provision among other things for "a dollar-for-dollar pass through of net increases in the cost of . . . refined petroleum products to all marketers or distributors at the retail level." 15 U. S. C. § 753(b)(2).

The agency's regulation set up two general pricing rules, dealing with "refiners" and "resellers" respectively. These rules control the maximum price which a firm may charge for its products and provide for a dollar-for-dollar pass through of increased product costs. See 10 C. F. R. Part 212. "Refiners" are required to pool their costs of acquiring crude oil and other costs of production and spread them over the production of all their United States refineries in determining their allowable ceiling price for any particular petroleum product. 10 C. F. R. Subpart E. "Resellers" are allowed to pass through directly to their customers any increases in such costs. *Id.* Subpart F.

Prior to the promulgation of the amendment hereinafter discussed, the term "reseller" for purposes of Subpart F included in Puerto Rico, as elsewhere, any entity of a refiner which purchased less than 5% of its petroleum products from its parent refiner and which "historically and consistently exercised the exclusive price authority with respect to sales by the entity." 10 C. F. R. § 212.91 (1974).

The following background facts as abstracted from the district court's comprehensive findings will serve to put the administrative action hereinafter discussed in context.

In Puerto Rico there are two main refiners of crude oil—Caribbean Gulf Refining Corporation and the Commonwealth Oil Refining Company (CORCO). Both being within the definition of refiner, Caribbean Gulf had to average its increased product costs in connection with the increased product costs incurred by its parent, Gulf Oil Corporation of the United States; CORCO, however, having no larger distribution system than Puerto Rico, was permitted to pass its increased product costs directly to Puerto Rican wholesalers. This resulted in Gulf, which refined about 25% of Puerto Rico's petroleum products, being required to sell its refined products at a price considerably below that of CORCO, the seller of about 75% of Puerto Rico's refined petroleum products.

Various marketers of petroleum products, including appellants, are located in Puerto Rico as wholly owned subsidiaries of mainland United States refiners. Because these subsidiaries bought practically all of their petroleum products from CORCO, and had historically and consistently exercised exclusive price authority, these marketers, prior to March 29, 1974, were permitted as "sellers" to pass

on any increased prices from CORCO directly through to their Puerto Rican customers. These price increases would have been larger than those being incurred in the mainland United States because CORCO depended almost entirely on Venezuelan crude oil[4] for its supplies and the price of that oil had increased from about $3 to over $14 per barrel, while the price of mainland crude oil had been held to about $5.50 per barrel.

Another seller of petroleum products in Puerto Rico is Shell P. R., which also was a major purchaser from CORCO and subject to the reseller rule.[5] Shell P. R. had no mainland parent corporation. It was 99.9% owned by The Shell Petroleum Company Limited, an English company.[6]

During the period following January 15, 1974, when the general FEA regulations became effective, FEA received many inquiries about the extent and scope of their applications. It was informed that retail gasoline prices could rise as much as 17 cents per gallon as compared with mainland prices because Puerto Rico was totally dependent upon foreign crude oil. Domestic crude oil of course was subject to FEA's price controls but the price of foreign crude which has precipitously risen could not be controlled. Be-

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[4] Approximately 99% of Puerto Rico's energy needs are derived from petroleum and about 100% of such petroleum is imported from foreign countries, principally Venezuela and Ecuador.

[5] Shell P.R. sold about 18% of the petroleum products consumed in Puerto Rico.

[6] The Shell Oil Company, a Delaware corporation, had no interest in Shell P.R. Its stock was approximately 30% public owned and 70% held by Shell Petroleum N.V., a Netherlands company. The stock of Shell Petroleum N.V. was owned 60% by Royal Dutch Petroleum Company, the Hague, Netherlands, and 40% by the "Shell" Transport and Trading Company, Limited, London, England. The Shell Transport and Trading Company, Limited, owned 40% of the Shell Petroleum Co., Ltd. of England and the latter owned 99.9% of the stock of Shell P.R.

cause of the cost of foreign oil, CORCO on February 1, 1974, increased the price of gasoline sold to its customers, including the appellant subsidiaries and Shell P. R. by approximately 17 cents per gallon. A two-tier pricing structure developed on the island. The higher price was charged by CORCO which accounted for 80% of all petroleum products consumed in Puerto Rico while the lower price was charged by Gulf, whose refinery generally furnished approximately 20% of all petroleum products.[7] The two-tier system caused widespread disruption.[8]

On March 20, 1974, FEA announced an amendment to its mandatory petroleum regulations with respect to Puerto Rico. Puerto Rican entities which were owned directly or indirectly by mainland United States refiners were to be

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[7] As has been noted, Gulf was subject to the refiner rule, so that its high cost foreign crude oil was averaged with the cost of lower priced domestic crude subject to United States price controls to make its overall price lower than that of CORCO which used only high cost crude oil.

[8] The lower court observed:

. . . [I]n March, 1974, Shell P.R. and Mobile Caribe attempted to increase prices by 12-14 cents per gallon. In February, 1974, the Gasoline Retailers Association decreed a two-day shutdown of gasoline stations to protest the petroleum problem. During this shutdown there was a major transportation strike causing severe dislocation in the Puerto Rican economy. In its submission to the FEA, the Commonwealth of Puerto Rico stated:

"The retailers with the lower prices would inevitably exhaust their inventory in the first days of the month. Those with higher prices would experience very low sales volumes during these early days, until the low cost products available on the island were exhausted. Price disparity will cause long lines at gasoline stations, which in addition to causing inconveniences to consumers, causes economic hardships to business purchasers, such as truckers and construction companies which must pay employees to wait in line to purchase fuel." 398 F. Supp. at 870.

subject to the refiner rule, not the reseller rule.[9] The FEA determined that there was good cause to make this amendment effective immediately. At about the same time it published notice that it would hold hearings in San Juan, Puerto Rico on April 8 and 9, 1974, for the purpose of determining whether the refiner rule, the reseller rule, or some other pricing regulations should be applied permanently to Puerto Rico. Concurrently FEA issued a separate order to Shell P. R. requiring it to adhere to its February 22, 1974, prices pending the outcome of the rule making proceeding. The effect of these actions was to assure that any price increases incurred by CORCO and passed on by CORCO to Mobile Caribe, Esso, Texaco P. R. and Shell P. R., and others in similar positions would not be passed on in full to Puerto Rican consumers. Rather, Mobil Caribe, Esso and Texaco P. R. could pass on only such price increases as were allowed under the refiner rule.

On May 16, 1974,[10] FEA issued its final mandatory petroleum price regulation applicable to Puerto Rico, reading in part:

> The FEO [now FEA] has concluded that the refiner price rule should be applied in Puerto Rico. The foremost consideration in this regard is the adverse impact that the reseller rule would have on the economy of

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[9] "This amendment to 10 C. F. R. 212 is to make clear that the special provisions of that regulation under which certain entities of a refiner may be considered to be resellers shall not apply to any entity of a refiner which operates in Puerto Rico and which is owned or controlled by a refiner that is subject to the price regulations of Subpart E of Part 212 of the Federal Energy Office." 39 Fed. Reg. 10434 (1974).

[10] The order was issued May 16, 1974, and published in 39 Fed. Reg. 17764 on May 20, 1974.

> Puerto Rico. The Emergency Petroleum Allocation Act of 1973 included Puerto Rico in the allocation and price regulation system contemplated by the Act, and the need to maintain "equitable" prices for petroleum products in Puerto Rico is particularly acute in view of the nature of the Puerto Rican economy.
>
> Although Puerto Rico does have a semi-autonomous governmental status, the fact that it has been included in the definition of the United States under the Emergency Petroleum Allocation Act of 1973 means that the averaging of costs in Puerto Rico with costs in the mainland United States cannot properly be regarded as a subsidy, any more than the averaging of costs with respect to one state where the costs are high with those of another state where costs are low can be regarded as a subsidy from one state to another.

The agency described the mainland Shell Oil Company as:

> . . . a Delaware corporation, which does not have any direct or indirect interest in the Shell Company (Puerto Rico), and the stock of which is approximately 30 percent publicly held and 70 percent owned by Shell N. V., a Netherlands company. (The stock of Shell Petroleum, N. V. is owned 60 percent by Royal Dutch Petroleum Company, The Hague, Netherlands, and 40 percent by the "Shell" Transport and Trading Company, Limited, London, England. The "Shell" Transport and Trading, Limited, London, England, owns indirectly, the Shell Company (Puerto Rico)). . . . 39 Fed. Reg. at 17764.

As to Shell P. R., FEA provided:

> As noted above, Shell (Puerto Rico) is not owned directly or indirectly by a mainland United States refiner. Accordingly, it must be treated as a reseller under the price regulations and permitted to pass through its increased product cost in the form of increased prices. In order to avoid the potentially disruptive and chaotic effects in the marketplace of having one marketer with prices substantially in excess of those of the other marketers, FEO has determined that it is necessary to require CORCO to adjust its prices to Shell (Puerto Rico) downward, and to permit CORCO to make an upward adjustment in the prices it charges to its other customers, so that it will continue to obtain a dollar-for-dollar pass through of its increased product cost. 39 Fed. Reg. at 17765.

Subsequent to issuance of the above-noted regulation, CORCO, as required by the regulation, sought from Esso, Mobile Caribe and Texaco P. R. data so that it could figure according to a complex FEA formula the amount by which CORCO would have to reduce its price to Shell. There is no disagreement among the parties as to the operation of the formula if it were in fact validly promulgated. The appellants refused to pay invoices reflecting the amount they owed CORCO for the Shell adjustment. Notices of probable violations and remedial orders were served by the agency and in due course administrative remedies were exhausted. These actions were then commenced in the district court by the plaintiffs-appellants. The parties stipulated for a continuation of the temporary restraining orders initially entered by the trial court. In each of the cases United States of America was allowed to intervene for the purpose of as-

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serting a counterclaim that the respective defendants be ordered to pay the sums allegedly due to CORCO. The Commonwealth of Puerto Rico also intervened in one of the actions. Cross-motions for summary judgment were filed and the summary judgments followed.

Issues for Review

The following issues have been submitted by appellants for review:

1. Whether the FEA gave adequate notice, as required by 5 U. S. C. § 553 for its intention to impose the Shell "subsidy".

2. Whether the FEA's exemption of Shell P. R. from the refiner pricing rule was required or permitted by the FEA's regulations.

3. Whether, assuming the FEA's regulation required or permitted this special treatment of Shell P. R., the provisions of the FEA's order establishing the Shell "subsidy" were nevertheless arbitrary, capricious, an abuse of discretion or otherwise unlawful.

4. Whether the Shell "subsidy" was effective as of publication on May 20, 1974, rather than after the 30-day delay period prescribed by 5 U. S.C. § 553.

Substantive Challenges

With reference to the appellants' substantive attacks upon the regulations in question, the scope of our judicial inquiry has been repeatedly defined and need not be elaborated upon here. Our province is simply to determine whether the issuance of such regulations was in excess of the agency's authority, was arbitrary or capricious or was otherwise

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unlawful under the criteria set forth in 5 U. S. C. § 706(2) and section 211(d)(1) of the Economic Stabilization Act of 1970, 12 U. S. C. § 1904 note (Supp. 1975). The arbitrary or capricious standard requires a determination whether the decision was based on a consideration of relevant factors, whether there has been a clear error of judgment and whether there is a rational basis for the conclusions approved by the administrative body. *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974); *Pacific Coast Meat Jobbers Ass'n, Inc. v. Cost of Living Council*, 481 F. 2d 1388, 1391 (TECA 1973). The burden is on the objectors to demonstrate the invalidity of the regulations. *Pasco, Inc.* F. 2d —— (No. 10-7, TECA 1975); *Condor Operating Co. v. Sawhill*, 514 F. 2d 351, 359 (TECA 1975), *cert. denied*, 43 U. S. L. W. 3614 (May 14, 1975); *American Nursing Home Ass'n v. Cost of Living Council*, 497 F. 2d 909, 914 (TECA 1974).

FEA's determination to apply the refiner rule to Puerto Rican entities controlled directly or indirectly by mainland United States refiners was fully justified. The statement of the purposes of that determination contained in the May 16, 1974, regulation in the light of the situation existing in Puerto Rico which has been briefly reviewed, was compelling. The FEA acted to prevent what it considered inequitable prices which would have resulted in Puerto Rico if CORCO's full product increases were passed on solely within the Puerto Rican market. This action was clearly within the authority granted by Congress to assure equitable prices. 15 U. S. C. § 753(b)(1)(F) (Supp. 1975). See *Pasco Inc. v. FEA*, —— F. 2d —— (No. 10-7 TECA 1975); *Cities Service v. Federal Energy Administration*, —— F. 2d —— (TECA No. DC-34 1975).

The appellants in the present appeals really do not question this, except to contend that Shell P. R. had to be

treated in the same way, and particularly that in treating it differently there was no authority nor justification for imposing upon the mainland appellants a burden of cost transfer to their mainland customers. All of appellants attack what has been termed the "Shell differential" or "Shell subsidy" provision (depending usually upon which side is speaking) of the FEA's mandatory pricing regulation. It is contended that the FEA was in error in concluding that Shell P. R. had to be treated as a reseller, rather than a refiner under the broader regulation, and that its differential treatment was beyond FEA's authority, not supported by any rational basis and arbitrary and capricious. We reject these arguments essentially for the reasons stated in the trial court's decision except as noted in the discussion that follows.

Shell U. S. and Shell P. R. are both controlled directly by a commonly held group of parents. If these parents were United States corporations, as the trial court observed, no doubt the FEA would have concluded that Shell P. R. had to be treated under the refiner rule. A problem that obviously troubled the trial court was whether it was consistent with existing FEA regulations to conclude that because of foreign ownership, Shell P. R. should be classified as a reseller. Conceding that Shell P. R. and Shell U. S. could have been treated together under the refiner rule in its literal confines, the trial court looked to differentiating circumstances relied upon by the agency in concluding that for purposes of the application of the refiner rule, the "parent" must be a United States corporation. The trial court in sustaining that interpretation gave deference to the administrative judgment and concluded that the agency's decision did represent a rational exercise of the powers delegated to it and that there was no clear error of judgment. See *University of So. Cal. v. Cost of Living Council*, 472 F. 2d 1065

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(TECA 1972), *cert. denied*, 410 U. S. 928 (1973). While we are not persuaded that even definitional technicalities would have justified a different interpretation by the agency, we are in full agreement that the administrative determination of the question should be sustained.

In view of the interpretation last mentioned, the agency's action was an attempt to equalize the disparity between Shell P. R.'s market prices and those of the other Puerto Rican marketers. To this end, the FEA devised the price adjustment formula[11] based on prices charged by CORCO to all Puerto Rican marketers. Granted that such a solution to a manifest and recognized problem was as a means particularized with reference to a single company, it was nonetheless a rational response to that problem and one which took into consideration the statutory responsibilities of the agency. That the FEA's solution was integrated with a nationwide mechanism rendered it neither irrational nor arbitrary under the circumstances. That there came a time when the agency determined that changed conditions warranted termination of the differential did not make the initial determination capricious or arbitrary in view of the

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[11] The formula directed CORCO to adjust its prices to Shell P. R. downward and adjust upward, by proportionate amounts, its prices to its other consumers. Thus, CORCO would continue to obtain a dollar-for-dollar pass through of its increased costs. CORCO's selling price to Shell P. R. for each product during each month was to be the weighted average price at which its products were currently being sold by marketers in Puerto Rico other than Shell P. R., less the January 15, 1974, margin of the latter. Hence, in the last analysis it was not a "subsidy" to Shell P. R., but rather an attempt to assure equitable prices to Puerto Rican consumers. It was, as the affidavit of David G. Wilson, Principal Deputy General Counsel for FEA *appropriately summarized in* the district court: "The added costs attributable to the Shell adjustment" was a spreading "into the domestic pricing formula of the major refiners having Puerto Rican marketing entities so that the prices of a major segment of one area . . . would not be inequitably high and so that a major marketing entity in Puerto Rico not owned by a U. S. refiner would not be forced out of business." (R. 847.)

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reasonable discretion and presumed expertise of the agency and its unrebutted finding that conditions had in fact significantly changed.

Procedural Challenges

With reference to the procedural assertions of appellants, the district court concluded that the notice of March 20, 1974, " . . . simply fails to indicate that Shell P. R. even was going to be considered at the hearing."[12] It, however, agreed with the government that since appellants received actual notice at the hearing of the subject matter of the proposed rule, any antecedent technical noncompliance with the Administrative Procedure Act was not fatal. The trial court stated:

> It appears to the court that at the hearings themselves it should have been obvious to all participants that FEA was extremely concerned about how to handle the pricing of petroleum products by Shell P. R. Indeed, at various times the prospect of the Shell differential was brought up very explicitly. The court concludes that this constitutes actual notice of the subject and issues involved. Certainly it would have been better if FEA had given explicit prior notice but it is likely that FEA did not know until the hearing or shortly before it that Shell P. R. would present such a special case. At the hearing FEA did raise the problem repeatedly and, in this court's opinion, sufficiently to meet the requirements of *California v. Simon*, 504 F. 2d 430, 440 (TECA 1974), *cert. denied*, 419 U. S. 1021, 95 S. Ct. 496, 42 L. Ed. 2d 294 (1974). 398 F. Supp. at 881.

Mobil and Mobil Caribe also contended in the trial court, and all of the appellants argue here, that because the May

[12] 398 F. Supp. at 880.

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16, 1974, order did not explicitly direct the immediate effectiveness of the regulation and the existence of good cause therefor, the regulation did not become effective until thirty days after its publication, which would have been June 19, 1974.[13] The district court rejected Mobil's contention.

As to the sufficiency of the initial notice, the trial court accepted appellants' argument that under the FEA's interpretation in applying the reseller rule to Shell P. R., the latter "was not considered the 'subsidiary of a refiner' and thus the rule-making notice seems on its face to preclude any consideration whatsoever of Shell" and that "the notice of March 20, 1974, simply fails to indicate that Shell P. R. even was going to be considered at the hearing." 398 F. Supp. at 880. Again, we entertain a somewhat different view. The preclusion seen by the trial court in the notice by technically relating the refiner definition from other context really is not there either from a technical standpoint[14] or

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[13]Texaco and Exxon did not contend before the district court that the order, if otherwise valid, would not have become effective for thirty days. In view of our other conclusions it is unnecessary for us to decide whether they thereby waived consideration of the point here.

[14] The notice, 39 Fed. Reg. 10454 (1974), issued on March 18, 1974, and printed March 20, 1974, stated in part:

> Notice is hereby given that the Federal Energy Office will receive written comments and hold a public hearing in San Juan, Puerto Rico, with respect to whether certain entities operating in Puerto Rico which are owned or controlled by refiners should be subject to the price regulations applicable to refiners, to the price regulations applicable to resellers, or to some other form of price regulation. By an amendment to the rule with respect to resellers, the Federal Energy Office today has made clear that certain of such entities are subject to the refiner price regulations, and this proceeding is to determine whether that treatment or some other treatment under the Mandatory Petroleum Price Regulations is appropriate."

It is to be observed that the first reference to "certain entities operating in Puerto Rico which are owned or controlled by refiners" is more general than the later reference to "certain of such

by reasonable intendment in view of contemporaneous orders[15] and the surrounding circumstances some of which we have already reviewed.

All of this lent point to the statement in the agency's March 20, 1974, order that "[t]he question of whether certain Puerto Rican subsidiaries of refiners should be considered as refiners, as resellers, or should be subject to some other form of price regulation, involves difficult questions which can best be resolved in a public rule making proceeding." It is true that a solution to these difficult questions was not spelled out in the notice; apparently it could not be, nor did it have to be. There was clear indication, however, that the interim order was not thought by the agency to resolve the questions or to limit the subject matter of the hearing. A hearing apparently was set, rather than merely opportunity for written comments afforded, for the purpose of better exploring solutions within the scope of the subjects described in the notices.[16]

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entities [which by amendment to the reseller rule] are subject to the refiner price regulations." It was with reference to the broader class, which included both Shell P. R. and those certain others subject to the refiner rule, that the issue (of whether the refiner rule, the reseller rule or some other form of price regulation should apply) pertained. The concluding phrase does not change this meaning, since it merely in effect restates that the proceeding is to determine whether the treatment already ordered as to certain of those refiner entities "or some other treatment under the Mandatory Petroleum Price Regulations is appropriate" in consideration of the broader class first mentioned.

[15] The agency put into immediate effect an interim order excluding from the reseller rule "any entity of a refiner which operates in Puerto Rico and which is owned or controlled by a refiner that is subject to the price regulations of Subpart E of Part 212 of the Federal Energy Office." 39 Fed. Reg. 10434 (1974). On the same date the FEA issued a separate order to Shell P. R. freezing its prices pending the outcome of the rule making proceeding.

[16] There were two notices, one from which a quotation already has been set out in the note 14, supra, and one fixing the time of the hearing. 39 Fed. Reg. 11314 (printed March 27, 1974).

But if there were any insufficiency in the "description of the subjects and issues" to be considered, we agree with the trial court that actual notice on the part of the appellants rendered such deficiency nonprejudicial and reasonably satisfied the requirements of the Administrative Procedure Act.[17]

At the administrative hearing in San Juan on April 8 and 9, 1974, a discussion of the special problem of Shell P. R. fell naturally, indeed unavoidably, into the context of the discussions. Not only was the subject fully explored as a problem requiring solution within the scope of the hearing, but full opportunity was afforded for comment by the representatives of appellant. In fact, a proposal was advanced for discussion quite similar to the particular solution of the Shell P. R. problem finally adopted by the agency. The trial court in its opinion referred briefly to some of these instances. In view of the appellants' renewed contentions that these represented merely general or passing comments without fair indication that they concerned a problem to be treated by the prospective regulation, we refer to the record in more detail.

The affdavit of Noel Totti, Jr., Managing Director of Shell P. R., which appears as part of the record in all three actions, supplements and clarifies the transcript of the hearings before the administrative agency as a result of the March, 1974, notices. The presence of representatives

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[17] With reference to rule making, 5 U. S. C. § 553 presently provides in pertinent part:

> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—
>
> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

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of all of the appellants at the time of each of the statements hereafter recited was alleged upon information and belief by Mr. Totti. Those allegations have not been questioned by appellants.[18]

On April 8, 1974, Esso's representative, Mr. Griffith, testified. At the completion of his prepared testimony Mr. Wilson of the FEA General Counsel's Office, who presided over the hearings, said:

> . . . When we amended the price regulations in March to require rolling in, one of the companies that did not, the principal company that did not fall under that formula was Shell Puerto Rico. And this I might point out was due to its peculiar corporate structure and the fact that the parent would be outside the United States.
>
> Would you have any recommendations as to how we should treat Shell Puerto Rico, which if it were not treated specially, would end up charging something like 17 cents above all the other companies in Puerto Rico?"

Mr. Griffith responded, "Well, I think I would just prefer not to comment on Shell's situation. . . ."

Mr. Wilson asked a similar question at the conclusion of the testimony of Martin Brinitzer, Manager of Compania Petrolera Chevron, another marketer of petroleum products in Puerto Rico (subsidiary of Standard Oil of California). Mr. Brinitzer responded: "No, I can't really offer a solution to that particular problem other than to revert to a noncontrol situation."

At the conclusion of testimony by Elliott M. Mager, CORCO's Vice President of Planning and Economics, Mr. Wilson asked the following question:

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[18] Inquiry of counsel for appellants from the bench during oral argument confirmed the accuracy of Mr. Totti's representations.

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As you know, the Emergency Allocation Act of 1973 requires a dollar for dollar pass-through for all companies, which means essentially that when you buy crude oil, if the price goes up you are allowed to pass that through as a refiner. However, one of the problems that we seem to have in Puerto Rico is the fact that some or many of the companies that are operating in Puerto Rico operate under different corporate structures, which would affect the rules under which they will in turn pass through the costs. What would be your reaction to trying to alleviate this condition by changing the prices which Corco charges to the various companies that are retailing in Puerto Rico?"

Mr. Mager responded that he would be concerned with administrative difficulties "unless this was controlled directly by some higher authority." Mr. Wilson went on to say:

> . . . of course you could not do this on your own, otherwise you would be in violation of the Energy Office regulations as they now stand, but what I am suggesting for your comment is some sort of order by the FEO that would adjust prices charged to companies operating in Puerto Rico.

Mr. Mager responded:

> . . . other than what I have said so far I really don't feel I can make any further contributions with specific recommendations.

On April 9, 1974, Mr. Totti himself testified on behalf of Shell P. R. Among other things he said:

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As we have mentioned before in the case of The Shell Company (Puerto Rico) Limited which does not have the corporate capability to average in with a parent U. S. refiner, it is our opinion that in order to maintain an economically viable operation we must be granted an allocation to buy product from a supplier whose price structure already reflects the averaging in feature, or alternatively, that Corco be required to sell to us at lower prices to permit us to be competitive while recovering the normal mark up.

Following this testimony, Mr. Wilson commented:

The second alternative was to have Corco lower its prices to Shell in relation to the prices charged to other companies, in effect spreading the price, the increased cost, through the other companies through their U. S. operations.

At the conclusion of the prepared testimony of Mr. Morefield, General Manager and President of Mobil, Mr. Wilson questioned the feasibility of treating all corporate entities operating in Puerto Rico in the same manner:

But won't this result in different treatment within Puerto Rico unless we do look behind the actual corporate structure of some of the corporations operating in Puerto Rico? Won't this cause the differences in price of, you know, some 17 cents or so that exists in Puerto Rico?

Mr. Morefield's answer was that all such entities should be treated either as resellers or as "independent refiners" which would have had the same effect.

At the opening of the hearing on April 8, 1974, if not common knowledge in the industry before, it was specifi-

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cally revealed by the representative of Shell P. R. that in view of its status as a reseller and in order to mitigate the substantial losses being suffered, it had attempted to increase its selling price on March 18, 1974, to pass its higher product costs on to its customers despite the uncompetitive situation in which it would be placed. This increase, however, was rescinded on March 21, 1974, by a separate order of the FEA which directed that it make no further price increases without FEA approval.

At the outset in opening the hearing the presiding officer stated that at the conclusion of all the oral presentations each person who had given statements would be given an opportunity to make a rebuttal statement. At the close of the hearings it was announced that interested parties would be allowed until April 15, 1975, to submit additional written statements. None of the appellants availed itself of these opportunities with respect to the Shell P. R. problem. Appellants filed no statements concerning the Shell P. R. situation at any time before the regulation was issued.

Appellants argue that even though notice to the extent required by the Administrative Procedure Act (APA) had been received at the time of the hearing, it would have been insufficient as a matter of law because of its timing. They cite *In re Gault*, 387 U. S. 1, 33 (1967), in support of their argument that "notice that comes only during the hurly-burly of a hearing is at best an inadequate substitute for the advance notice that enables one to prepare for the hearing."

The kind of hearing referred to in *In re Gault* of course was entirely different. In the type of rule making with which we are concerned,[19] a formal hearing is not mandated

[19] Section 207(a) of the Economic Stabilization Act of 1970, Pub. L. 91-379, as amended, Pub. L. 92-210 and Pub. L. 93-28, continued in effect by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 15 U. S. C. § 751 et seq., rendered 5 U. S. C. § 553 applicable to FEA's rule making.

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by the APA,[20] and no specific period of notice of the rule making is there specified. Manifestly, reasonable notice is contemplated by the statute, the rule making proceedings being the critical event and reasonable opportunity for comment and the submission of data by interested parties the crux of the requirement. The proceedings here originated with the original March notice, and culminated in the promulgation and publication of the mandatory regulation in May. We conclude that in the course of that proceeding, appellants received fair and reasonable advance notice of the subjects and issues finally covered by the regulation as it affected them in relation to Shell P. R. and that they were afforded fair and reasonable opportunity for comment and the submission of data in substantial compliance with the requirements of the APA. Cf. *California Citizens Band Assn. v. United States*, 375 F.2d 43 (9th Cir.), *cert. denied*, 389 U. S. 844 (1967).

Appellants' contention that in any event the regulation in question did not become effective until thirty days following its publication is based upon 5 U. S. C. § 553(d).[21] The regulation did not expressly provide that it was to be effective immediately upon publication, nor did it expressly relate statements in the rule that may have indicated good cause for making it immediately effective to any such intent.

However, there obviously was good cause for the regulation to be made effective immediately, and by clear implica-

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[20] 5 U. S. C. § 553(c). "After notice required by this section, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views or arguments with or without opportunity for oral presentation. . . ."

[21] 5 U. S. C. § 553(d) provides:

The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(3) as otherwise provided by the Agency for good cause found and published with the rule.

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tion when the text of the Order and the related circumstances of record are looked to that was its intent.

The March 20 interim regulation recognized the urgency of the general problem and by its terms was made effective immediately. Its purpose was indicated as being to preserve the existing price structure pending resolution of the rule making proceedings initiated by the notices mentioned. The April hearing demonstrated the continuing urgency of the entire problem, including the situation of Shell P. R. The mandatory regulation resulting from the hearing referred to the need to maintain equitable prices as being "particularly acute in view of the nature of the Puerto Rican economy." To avoid the market disruption which had been arrested by issuing almost simultaneously the March 20 interim amendment and the Shell P. R. freeze order, it seems evident that it was necessary to make the Shell differential effective immediately upon recognition of Shell's right to operate under the reseller rule. In describing the lawful base price that it could charge, the regulation allowed Shell P. R. to include an amount representing unrecouped product costs incurred between January 15 and May 15, 1974. Evidently it was anticipated that no such amounts would accrue after May 15 because May 16 was the date the regulation was promulgated.

In addition to the treatment of the Shell P. R. situation, the mandatory regulation as a result of urging by the oil companies authorized appellants to establish the base prices of their products in accordance with profit margins applicable on January 15, 1974, rather than the May 15, 1973 margins which were applicable prior to May 16.[22] There

[22] None of the published notices which preceded the April hearings contained any reference to the possibility that such a change would be made. This subject seems to have been less implicit in the March notices than the Shell issue.

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is indication in the record, and during oral argument the assertion of CORCO's counsel to the same effect was not questioned by counsel speaking for all of the appellants, that appellants acted upon this feature of the regulation as being effective without delay by raising their prices accordingly. In any event, Mobil's contention that the Shell provision was not similarly effective originated only after Mobil was billed by CORCO months later,[23] and Exxon and Texaco apparently did not perceive any problem as to immediate effectiveness until after these cases had been tried in the district court.

We conclude in view of all of the circumstances of record, as did the trial court, that this was not a case of any substantial departure from the requirements of the APA or prejudice from technically flawed procedures, and that it falls within the principle and reasoning of *Nader v. Sawhill*, 504 F. 2d 1064 (TECA 1974); *California v. Simon*, 504 F. 2d 430 (TECA), *cert. denied*, 419 U. S. 1021 (1974); and *DeRieux v. Five Smiths, Inc.*, 499 F. 2d 1321 (TECA), *cert. denied*, 419 U. S. 896. Cf. *Shell Oil Company v. FEA*, —— F. 2d —— (TECA 1975); *Tasty Baking Company v. Cost of Living Council*, —— F. 2d —— (TECA 1975), which involved significantly different circumstances.

The judgments below are affirmed.

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[23] Mobil terminated purchases from Shell P. R. within the 30-day period. The other appellants continued to purchase from CORCO. Sustaining of appellants' position as to the 30-day delay would place upon CORCO, having immediately complied with the order for reduction of prices to Shell P. R. the entire burden of the Mobil assessment and substantial portions of those against the other mainland appellants, disrupting the pass through mechanism provided by the regulation for that period.

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IN THE

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

Nos. DC-35, DC-36, and DC-37

TEXACO, INC., TEXACO PUERTO RICO, INC., MOBIL OIL CORPORATION, MOBIL OIL CARIBE, INC., EXXON CORPORATION, and ESSO STANDARD OIL S.A., LIMITED,

Plaintiffs-Appellants,

—v.—

FEDERAL ENERGY ADMINISTRATION, *et al.*,

Defendants-Appellees,

UNITED STATES OF AMERICA, COMMONWEALTH OIL REFINING COMPANY, COMMONWEALTH OF PUERTO RICO,

Intervenor-Appellees,

THE SHELL OIL COMPANY (PUERTO RICO) LTD.,

Amicus Curiae.

February 9, 1976

Before:

CARTER, CHRISTENSEN and JOHNSON,

Judges.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel.

In consideration whereof it is ordered that the judgment of said court is affirmed.

For the Court:

/s/ RUTH H. JACOBSON
Ruth H. Jacobson
Clerk

Nos. 74-1705, 74-1658 and 74-1617

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IN THE

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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Plaintiffs-Appellants,

—v.—

FEDERAL ENERGY ADMINISTRATION, *et al.*,

Defendants-Appellees,

UNITED STATES OF AMERICA, COMMONWEALTH OIL REFINING COMPANY, COMMONWEALTH OF PUERTO RICO,

Intervenor-Appellees,

THE SHELL OIL COMPANY (PUERTO RICO) LTD.,

Amicus Curiae.

March 18, 1976

Before:

CARTER, CHRISTENSEN and JOHNSON,

Judges.

Upon consideration of Appellants' Petition for Rehearing,

IT IS ORDERED that said Petition is Denied.

By Direction of the Court:

RUTH H. JACOBSON
Clerk

by /s/ DONNA M. BOLD
Donna M. Bold
Chief Deputy Clerk

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1503

TEXACO INC., TEXACO PUERTO RICO, INC., MOBIL OIL CORPORATION, MOBIL OIL CARIBE, INC., EXXON CORPORATION and ESSO STANDARD OIL S.A., LTD., *Petitioners,*

v.

FEDERAL ENERGY ADMINISTRATION and FRANK G. ZARB, Administrator, Federal Energy Administration, *Respondents,*

UNITED STATES OF AMERICA, COMMONWEALTH OIL REFINING COMPANY and COMMONWEALTH OF PUERTO RICO, *Intervenor-Respondents.*

BRIEF FOR THE COMMONWEALTH OF PUERTO RICO, INTERVENOR-RESPONDENT, IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the FEA rule in question should be invalidated for alleged procedural irregularities under 5 U.S.C. § 553.

2. Whether the FEA's interpretation of its own regulations, and the related special provision for Shell P.R., were rationally based.

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STATEMENT

Puerto Rico was specifically included within the reach of the EPAA.[1] Thus, federal price controls on petroleum were for the first time extended to Puerto Rico in the Federal Energy Administration ("FEA") regulations of January 15, 1974.[2] In the exercise of its responsibilities under the EPAA with respect to Puerto Rico, the FEA was from the outset confronted with serious potential economic dislocations caused by Puerto Rico's 99 percent dependence on foreign oil—the price of which had recently increased fourfold. At the same time "old" domestic crude oil, from which about 40 percent of all petroleum products consumed in the U.S. is refined, remained subject to U.S. price controls, resulting in cheaper product prices on the U.S. mainland.

Responding to this situation, the FEA by an order issued May 16, 1974 ("May 16 Order"),[3] in a rulemaking proceeding, applied its "refiner rule" to Puerto Rican marketing subsidiaries of U. S. major oil company refiners. The refiner rule was applied even though such marketing subsidiaries were supplied by CORCO[4]

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[1] The Emergency Petroleum Allocation Act of 1973, 15 U.S.C.A. § 751, *et seq.*

[2] 39 *Fed. Reg.* 1923 (January 15, 1974).

[3] 39 *Fed. Reg.* 17765 (May 20, 1974), (Petition, Appendix ("Pet. App.") pp. 6a-14a).

[4] Commonwealth Oil Refining Company, Inc., a "small" and "independent" refiner, as defined in § 3 of the EPAA, operates solely in Puerto Rico. CORCO refines about 75% of all petroleum products consumed in Puerto Rico but does not engage in retail distribution. Instead CORCO sells products to marketing subsidiaries of major oil companies (Exxon, Texaco, Mobil, Shell, Arco and Chevron) which in turn sell to retail "branded independent dealers." (Pet. App. p. 19a).

at prices reflecting CORCO's exclusive reliance on foreign crude (which naturally exceeded the average cost increases experienced by the mainland refiner parent companies). The effect was to ensure that gasoline prices in Puerto Rico would be compatible with those charged by the refiner parents in the U.S. This was required by the EPAA which instructed the President (and the FEA to which presidential authority and responsibility were delegated) to assure "equitable prices" for petroleum products among all regions of the United States. EPAA, Section 4(b)(1)(F).

At the rulemaking hearings held in April 1974, it was estimated that adoption of the refiner rule would save Puerto Rican consumers about $144 million annually in gasoline and diesel costs. (Pet. App. p. 3a). Absent the refiner rule, gasoline would have sold for 80-85 cents per gallon; with the refiner rule, retail prices averaged about 65 cents per gallon during 1974.

No Petitioner any longer challenges the application of the refiner rule in Puerto Rico.[5] Both the District Court and the Temporary Emergency Court of Appeals ("TECA") concluded that application of the refiner rule in Puerto Rico was a proper exercise of the agency's statutory responsibilities.

This case arose because of Petitioners' resistence to a practical temporary arrangement required by the FEA, in its May 16 Order, respecting The Shell Company (Puerto Rico) ("Shell P.R.") in order to fully effectuate the refiner rule. As FEA read its regulations, Shell P.R. was entitled to be treated as a "re-

[5] Mobil challenged FEA's application of the refiner rule in the District Court which sustained the rule. Mobil abandoned this claim in the appeal to TECA.

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seller" rather than a refiner, and thus directly pass-through dollar-for-dollar CORCO's increased charges for petroleum products. Although Shell P.R. was affiliated with Shell U.S., a refiner, it was not a subsidiary nor was it controlled in any way by Shell U.S. So the FEA concluded it was inappropriate under its regulations to require Shell P.R. to roll-in its cost increases with those of Shell U.S.

To avoid the market disruption which would have been caused if Shell P.R. either could, or could not, pass-through to consumers the much higher costs it was paying CORCO over the average costs of its competitors, (Pet. App. pp. 38a-40a), the FEA determined to work out equitable pricing at the wholesale level by regulating the prices charged by CORCO to all such marketers. Thus, CORCO was directed to reduce its prices to Shell P.R. to a level equating the average cost of gasoline experienced by the marketing subsidiaries of mainland refiners and permitted to recoup such price differential by charging slightly higher prices to the other marketers, including Petitioners. In concept, therefore, CORCO would recoup its increased foreign oil costs dollar-for-dollar; so would Shell P.R. without disrupting the marketplace; and so could the combination of the marketing subsidiary and the mainland parent of Petitioners and the other companies.[6]

The May 16 Order was preceded by notice of rulemaking published in the Federal Register on March 28,

[6] FEA regulations permitted Petitioners to recover all amounts paid CORCO by the marketing subsidiaries in their sales of products nationwide, including Puerto Rico. Any amounts not immediately recouped were "banked" for future recoupment when market conditions permitted. 10 C.F.R. Part 212, Subpart E.

1974, (Pet. App. pp. 3a-5a). Hearings were held in Puerto Rico on April 8 and 9, 1974, after which the hearing record was left open until April 15, 1974 to permit supplemental comments. Representatives of Petitioners participated in the hearings where the precise terms of the Shell differential were described repeatedly. (Pet. App. pp. 67a-73a).

In compliance with the May 16 Order, CORCO reduced its prices to Shell P.R. whose prices to retailers remained competitive. Petitioners, however, either resisted payment to CORCO of the Shell differential, paid under protest or ceased doing business with CORCO and made alternate supply arrangements. FEA's issuance of enforcement orders led to the filing of these suits below and the District Court's entry of judgment adverse to Petitioners. The Temporary Emergency Court of Appeals held that the published notice sufficiently described the scope of the hearings (Pet. App. pp. 66a-67a). It also affirmed the District Court's finding that actual notice of the Shell differential was given at the hearings (Pet. App. p. 68a) and concluded that Petitioners had fair and reasonable opportunity to participate in the rulemaking proceeding as contemplated by the Administrative Procedure Act ("APA") Section 4,[7] (Pet. App. p. 73a). Petitioners now seek a writ of certiorari from this Court to review the decision below.

ARGUMENT

The fundamental outcome of the FEA rulemaking, application of the refiner rule to Puerto Rico, is no longer challenged by Petitioners. The issues presented in this Petition challenge only the Shell differential

[7] 5 U.S.C. § 553.

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and are uniquely narrow, factual and insignificant. Similar issues concerning technical compliance with Section 4 of the APA as well as the question of the deference which should be given the reasoned action of the agency have been before this Court in *De Rieux* v. *Five Smiths, Inc.*, 499 F.2d 1321 (T.E.C.A. 1974), *cert. denied*, 419 U.S. 896 (1974); see also *California* v. *Simon*, 504 F.2d 430 (T.E.C.A. 1974), *cert. denied*, 419 U.S. 1021 (1974). As in these cases, the decision of the Court below was manifestly correct, and this case presents no issues worthy of review by this Court.

I. The Decision Below Was Correct

There is no doubt the published notice was sufficiently broad to engage the attention of Petitioners as well as all other marketers. All sent representatives to the hearings. Although present at the hearings Petitioners suggest the published notice was inadequate for failure to describe specifically the Shell differential. This argument was considered by TECA and rejected as a narrow and technical reading of the notice which ignored the surrounding circumstances and contemporaneous agency actions. (Pet. App. p. 67a).

Petitioners argue here, as they did unsuccessfully below, that the actual notice was defective as a matter of law because it did not meet the APA Section 4(b) technical requirement of service on "named parties." They almost say that anything less than a *Miranda* warning is legally insufficient. Petitioners have divorced the statutory words from the realities of the situation. Even though a change in the agency's rules was contemplated, it only involved the two refiners and seven marketers in Puerto Rico all of which are sophisticated petroleum companies which were present in full force

for the hearings. And the FEA's manner of proceeding approached a trial-type hearing with full oral statements, penetrating questions by the FEA panel (which also put any questions requested by other parties of any particular witness), opportunity for oral rebuttal statements as well as supplemental written submissions (for which the record was kept open an additional week). Clearly then, nothing more could have been accorded Petitioners by "naming" and "serving" them with the notice.

At the hearings the actual notice of the agency position, scope of the problem and the precise Shell differential were presented repeatedly. (Pet. App. pp. 68a-72a). It is inconceivable that these Petitioners were misled. In this unique fact situation the actual notice was fair and reasonable and the Courts below were clearly correct in so holding. (Pet. App. pp. 43a, 73a). And Petitioners' argument to the contrary merely challenges the factually oriented conclusion of both lower courts.

An additional procedural defect propounded is that the agency made the Shell differential immediately effective without ". . . good cause found and published . . ." as provided in Section 4(d) of the APA. But the facts here were properly evaluated by the Courts below and present the classic case for which the "immediately effective" exception was provided. (Pet. App. pp. 44a, 74a-75a). The Court correctly held that failure to publish the good cause, which was established in the record, was "non-prejudicial" and not a sufficient ground to invalidate the rule. (Pet. App. p. 75a). *De Rieux* v. *Five Smiths, Inc., supra; California* v. *Simon, supra.*

Petitioners assert the Courts below erred in deferring to the agency's interpretation of its own regula-

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tions. However, in assessing an agency's interpretation of its regulations, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulations." *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 414 (1944). Here, the agency was clearly justified in limiting exercise of its control over this most complex world-wide industry to those companies doing business in the United States. Therefore, the determination that Shell P.R., because it had no mainland parent, had to be treated differently than the marketing subsidiaries of mainland parents was rationally based.

Petitioners' insinuation that the FEA's removal of the Shell differential some four months later indicates it was invalid from the outset is simply incorrect. The record shows, and the Courts below concluded, that the change in the rule was due to changed circumstances and the FEA's assuring that such change would not adversely affect consumers in Puerto Rico.

II. There Are No Important Questions Presented

Petitioners attempt to suggest far-reaching influence of the decisions below on the administrative process. As important as the case is to the Commonwealth, and to CORCO who has yet to be paid the $8.5 million owed by Petitioners, we doubt the case will imperil our jurisprudence. The Shell differential, though vital to effectuation of an important rule, was itself limited in duration and the procedural questions raised by Petitioners concerning its adoption are mostly factual in nature, and have been adequately resolved in the two thorough opinions of the Courts below.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

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Intervenor-Respondent

May 19, 1976

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
FILED
MAY 25 1976
MICHAEL RODAK, JR., CLERK

No. 75-1503

TEXACO, INC., TEXACO PUERTO RICO, INC., MOBIL OIL CORPORATION, MOBIL OIL CARIBE, INC., EXXON CORPORATION, and ESSO STANDARD OIL S.A., LIMITED

Petitioners

v.

FEDERAL ENERGY ADMINISTRATION, *et al.*,

Intervenor-Respondents

UNITED STATES OF AMERICA, COMMONWEALTH OIL REFINING COMPANY, and COMMONWEALTH OF PUERTO RICO,

Intervenor-Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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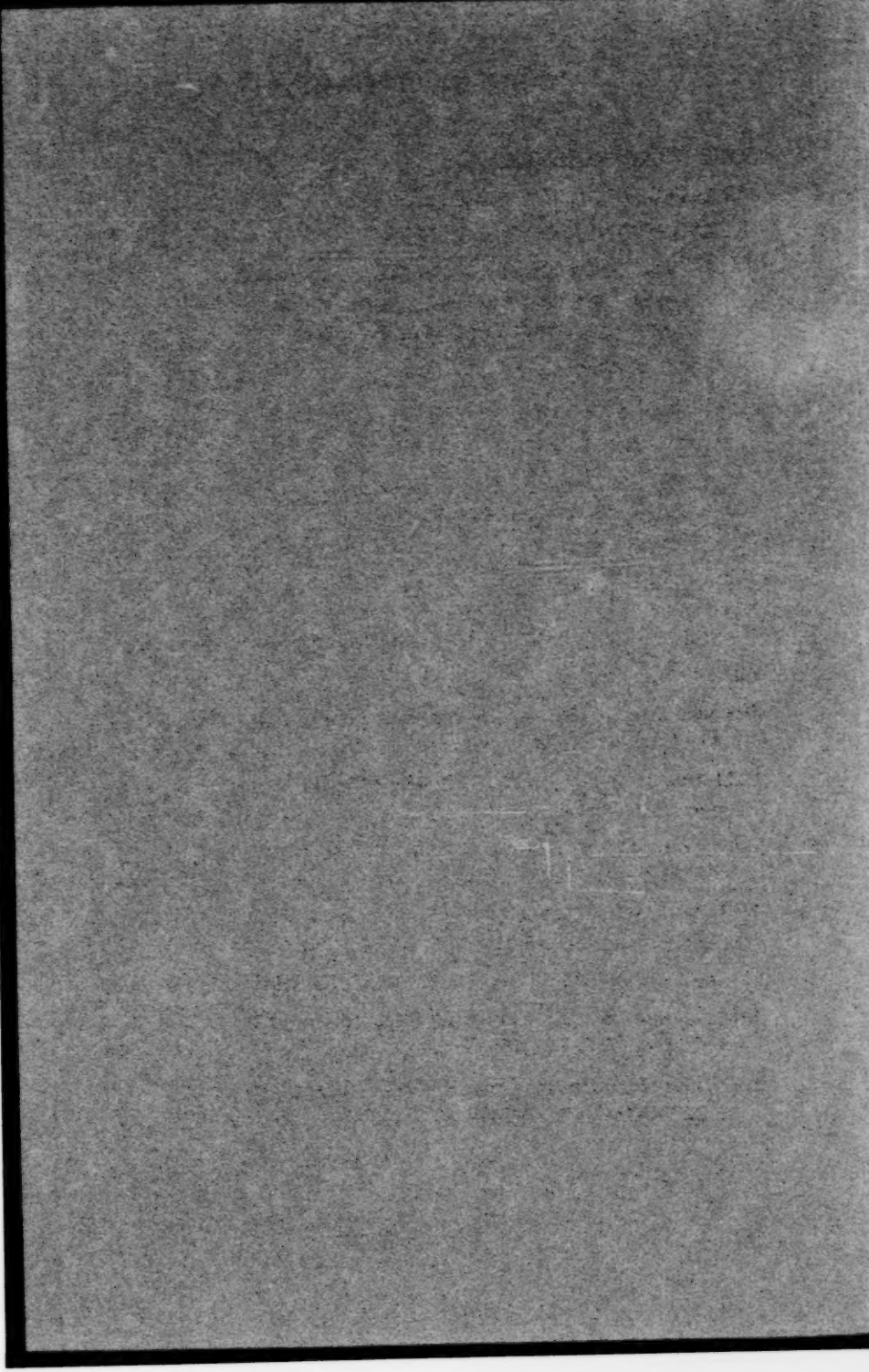

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OCTOBER TERM, 1975

No. 75-1503

TEXACO, INC., TEXACO PUERTO RICO, INC., MOBIL OIL CORPORATION, MOBIL OIL CARIBE, INC., EXXON CORPORATION, and ESSO STANDARD OIL S.A., LIMITED

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Intervenor-Respondents

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Intervenor-Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court review a case in which both the District Court and the Court of Appeals, after careful review of the record and in accordance with controlling precedent, found that the regulation challenged was published after adequate notice, became effective immediately, and was neither arbitrary nor capricious, but was a rational exercise of the agency's statutory authority?

STATEMENT OF THE CASE

This case arises out of the efforts of the Federal Energy Administration ("FEA") to provide for equitable pricing of petroleum products in Puerto Rico. This duty was imposed upon FEA by the Emergency Petroleum Allocation Act of 1973 (15 U.S.C. § 751 *et. seq.*) which called for "equitable prices among all regions and areas of the United States", including Puerto Rico. (15 U.S.C. § 753(b)(1)(F).)

Because of its complete dependence upon foreign crude oil (the price of which could not be controlled by the regulations applicable to domestic crude), Puerto Rico experienced in 1973 and 1974 tremendous increases in the prices charged for petroleum products. These price increases were even greater than those experienced in the mainland United States. They posed a serious threat to the island's already weak economy since petroleum products are virtually its only source of energy.

On March 20, 1974, the FEA sought to eliminate the disproportionate burden imposed on Puerto Rico by virtue of its unique dependence on foreign crude oil. It

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did so by amending its price regulations on an interim basis so as to require Puerto Rican marketers to compute their maximum prices under the FEA's refiner price rule rather than the reseller rule. While making this amendment effective immediately, the FEA simultaneously gave notice of a hearing (later held on April 8 and 9, 1974) to consider whether this or some other solution to Puerto Rico's problem should be permanently adopted. Following the hearings, which were attended by representatives of petitioners, the FEA published on May 20, 1974 a regulation which made permanent the amendment first published on March 20.

* * *

Many of the major American oil companies, including petitioners, operate in Puerto Rico through wholly-owned subsidiaries. Prior to the amendment of March 20, 1974, those subsidiaries had been governed by the FEA pricing regulations applicable to "resellers" (10 C.F.R. § 212.91 *et. seq.*) rather than the regulations applicable to "refiners" (10 C.F.R. § 212.81 *et. seq.*). Under the reseller rule, these subsidiaries were considered to be independent from their mainland parents and were permitted to pass along dollar-for-dollar the price increases for products independently purchased by them.

In view of the upward pressure on prices in Puerto Rico, the application of the reseller rule to these Puerto Rican subsidiaries created an obvious problem in light of FEA's duty to maintain "equitable prices" throughout the United States. The agency was informed in early 1974 that gasoline prices in Puerto Rico could increase as much as 17¢ vis-a-vis mainland prices.

Respondent Commonwealth Oil Refining Company, Inc. ("CORCO"), which imported and refined only

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high-priced foreign crude oil, produced approximately 80 percent of all gasoline consumed in Puerto Rico. The other island refiner of gasoline, Carribean Gulf Refining Corporation (Gulf), accounted for the remaining 20 percent. Both CORCO and Gulf were subject to the FEA's refiner pricing rule. Under this rule, Gulf's prices were determined by averaging the cost of its high-priced foreign crude oil with the cost of the price-controlled, cheaper domestic crude used by its mainland parent. Because of increases in the price of foreign crude oil upon which it was wholly dependent, CORCO, on February 1, 1974, increased the price of gasoline sold to its customers (including petitioners) by 17¢ per gallon. The maximum prices which Gulf was permitted to charge under FEA regulations took mainland Gulf's supplies of cheaper domestic crude oil into account, and hence were substantially lower than CORCO's. Since FEA regulations at the time permitted the Puerto Rican retail marketers to raise their prices in step with their increased costs, a two-tiered retail pricing structure was thus created on the island, causing widespread disruption.

In response to these circumstances, the FEA amendment of March 20 required the Puerto Rican marketers on an interim basis to price their products using the refiner rule rather than the reseller rule. The refiner rule prevented these subsidiaries of U.S. refiners from raising their prices in step with the increases in price charged them by their suppliers, including CORCO. Rather, their prices were determined by averaging such increased costs with the cost increases experienced by their much larger mainland parents, each of which used substantial amounts of low-cost domestic crude oil. The application of the refiner rule to these marketers caused retail gasoline prices in

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Puerto Rico to fall approximately to the levels prevailing on the mainland.

Together with the March 20 amendment, FEA published a notice entitled "Proposed Price Regulations and Public Hearing" which called for public hearings on the question of whether for the future the Puerto Rican marketers should operate under the refiner rule, the reseller rule or "some other form of price regulation". The notice invited interested parties to address themselves to several issues, including "the place in the overall corporate structure of the refiner which is occupied by the Puerto Rican entity . . . ." Appendix to Petition ("Pet. App.") 4a.)

At the hearings on April 8 and 9, 1974 the major oil companies urged return to ther reseller rule to protect the independent profitability of their Puerto Rican subsidiaries. Puerto Rican officials pointed out that a return to the reseller rule would cost Puerto Rico $144,000,000.00 in increased prices over the following year and would inevitably lead to a recurrence of two-tiered retail pricing and resultant instability.

On May 20, 1974, FEA published regulations making permanent the interim regulation which had been published on March 20. In adopting the refiner price rule for Puerto Rico, FEA stated that the foremost consideration in this regard is the adverse impact that the reseller rule would have on the economy of Puerto Rico. In addition to making permanent application of the refiner price rule, FEA responded to comments which had been presented by the marketing companies during the April hearings to the effect that they should no longer be required to adhere to the unusually small profit margins which were in effect in Puerto Rico on May 15, 1973. FEA concluded that an adjustment was in order and allowed the marketing companies to adopt

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the margins which were effective on January 15, 1974, the date the FEA regulations became applicable in Puerto Rico. This permitted the petitioners to raise their prices and they promptly did so.

In deciding to apply the refiner rule on a permanent basis, FEA had also to confront the problem of how to treat The Shell Company (Puerto Rico) ("Shell Puerto Rico") which, unlike all of the other Puerto Rican marketing subsidiaries, is owned by an English rather than an American parent company. The FEA reasoned that under its applicable rules and definitions, Shell Puerto Rico could not be combined with The Shell Oil Company (United States) ("Shell U.S.") for purposes of ordering them to allocate costs as a single firm. Accordingly, it concluded that Shell Puerto Rico, unlike the other Puerto Rican subsidiaries, must be treated as a reseller. Absent further regulation, Shell Puerto Rico would have been permitted to charge prices substantially higher than the other marketers, and the spectre of the two-tiered retail market given renewed life. Accordingly, "to avoid the potentially disruptive and chaotic effects in the marketplace of having one marketer with prices substantially in excess of those of the other marketers", FEA directed CORCO to adjust its prices to Shell Puerto Rico downward and its prices to its other customers upward on a pro rata basis so that CORCO would "continue to obtain a dollar-for-dollar pass through of its increased product costs". In effect, CORCO was ordered by FEA to serve as a conduit for a price adjustment intended to prevent a recurrence of the two-tiered retail price structure which had caused serious economic disruption earlier in the year.

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Other solutions to the Shell problem were considered by FEA and rejected. One possibility was to have Shell Puerto Rico acquire its products from the Gulf refinery which, for the reasons noted above, was required to sell at prices lower than CORCO's. This solution was rejected because the Gulf refinery simply did not produce enough to satisfy the demands of its historical customers and Shell Puerto Rico as well. The other possible solution was to have Shell Puerto Rico average its costs with those of Shell (U.S.). Not only the FEA but other participants at the hearings believed that Shell Puerto Rico could not be required to average in its costs with Shell (U.S.). For example, the Mobil representative testified at the hearings that "Shell . . . can't fold in at all . . . ."

Petitioners did not take advantage of the opportunity to submit additional written comments to FEA after the hearings were concluded. Nor did Exxon and Mobil, following promulgation of the May 20 regulations, seek administrative review. (Texaco sought review one month later.) Instead they immediately implemented those provisions of the regulation which permitted them to increase their prices and profit margins. All three continued to accept product from CORCO knowing of CORCO's adherence to those portions of the May 20 regulation which provided for the Shell price adjustment. Months later they refused to pay invoices tendered by CORCO to reflect their pro rata share of the price reductions which CORCO had granted Shell Puerto Rico under the terms of the regulation. Those invoices, totalling approximately $8,500,000.00, have not yet been paid.

With an easing of the supply situation for crude oil and gasoline, the Shell differential was eliminated on October 4, 1974, after the FEA had obtained assurances from Shell Puerto Rico that it would not

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increase its prices, while efforts were pending to reduce its product costs. The October 4 Order did not provide any pass through cost mechanism between Shell Puerto Rico and Shell (U.S.), the agency continuing to feel that its regulations did not permit such treatment of these two firms.

Petitioners Mobil, Exxon and Texaco (and their wholly-owned Puerto Rican subsidiaries) challenged the amended regulations in the United States District Court for the District of Columbia. On June 17, 1975 the District Court granted summary judgment for CORCO (and for defendant FEA and intervenors Commonwealth of Puerto Rico and the United States) and ordered petitioners to pay CORCO the $8,500,000.00 together with interest at the statutory rate of 6 percent. Petitioners simultaneously appealed to the Temporary Emergency Court of Appeals and to the Court of Appeals for the District of Columbia Circuit. On February 9, 1976, TECA affirmed the judgments of the District Court. TECA subsequently denied petitioners' motion for reconsideration but granted a stay of execution of the judgment, "until the final disposition of any petition for writ of certiorari to the Supreme Court of the United States was (timely) filed". Respondent moved the Circuit Court of Appeals to dismiss petitioners' appeal for lack of jurisdiction. On April 9, 1976, that Court ordered that respondent's motion to dismiss be held in abeyance pending disposition of this petition.

REASONS FOR DENYING THE WRIT

Petitioners have failed to suggest any reasons why this Court should grant the petition. Although they

complain of the result, they cannot seriously contend that the decisions below conflict with the decision of this Court or of any Court of Appeals.

Petitioners tender essentially three issues for review by this Court: (1) whether FEA's actions were arbitrary and capricious; (2) whether petitioners received adequate notice; and (3) whether the May 20 regulation became effective immediately. Each of these issues was exhaustively and painstakingly considered by both the District Court and TECA in light of the standards of review articulated by this Court.

With respect to the rationality of FEA's actions, TECA expressed doubt that the agency could have taken any other course and concluded that its solution was "a rational response to that problem and one which took into consideration the statutory responsibilities of the agency". (Pet. App. 64a.) Regarding adequacy of notice, TECA concluded that under all the surrounding circumstances, the published notice properly informed interested parties of the subjects and issues involved in the rulemaking. (Pet. App. 67a-68a.) Further, TECA concluded that the May 20 order was obviously intended to take effect immediately and that there was good cause for it to do so. (Pet. App. 73a-74a.)

TECA concluded that this was "not a case of any substantial departure from the requirements of the APA or prejudice from technically flawed procedures . . . ." (Pet. App. 75a.) As petitioners failed to show any substantial failings of FEA, so they failed to show any real prejudice to themselves. FEA was not required to hold hearings at all in this matter. It did so "for the purpose of better exploring solutions" to the problem it confronted. (Pet. App. 67a.) With respect to the unique situation of Shell Puerto Rico, FEA "fully explored [it] as a problem requiring solution within the scope of the hearing" and "full opportunity was afforded for

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comment by the representatives of [petitioners]." (Pet. App. 68a.) Both courts below properly concluded that petitioner's had in this case been afforded in all respects the procedural "due process" which the APA is intended to assure. Contrary to petitioners' claim, the decisions below do not allow evasion of the requirements of the APA.

Petitioners were familiar with the problems confronted by FEA. They received adequate notice of the proposed rulemaking. They participated in public hearings. They were given the opportunity to file written comments and to seek administrative review. They interpreted the May 20 order as being effective immediately for purposes of obtaining the benefits it afforded them. In short, petitioners were simply not prejudiced in any material respect. Nevertheless, petitioners would impose the entire $8,500,000.00 cost of the Shell adjustment upon CORCO, despite the fact that CORCO was drafted by FEA to act as a conduit and was never intended to bear any economic risk as a consequence of the FEA regulation.

I.

THE ISSUES POSED BY PETITIONERS WERE CORRECTLY DECIDED BY THE COURTS BELOW IN ACCORDANCE WITH CONTROLLING PRECEDENT.

A. NOTICE

Petitioners argue that the notice of Proposed Price Regulations and Public Hearing published in the Federal Register by the FEA on March 20, 1974, was inadequate in that it did not afford the parties an

opportunity to address and discuss "the special treatment accorded Shell Puerto Rico in the subsequent May 20 Order".

Section 4 of the APA requires that notice of proposed agency rulemaking contain

> *Either* the terms or substance of the proposed rule *or* a description of the subjects and issues involved. [5 U.S.C. § 553(b)(3). Emphasis added.]

TECA specifically found that the March 20 notice adequately informed interested parties of the subjects and issues involved in the rulemaking. The Court's finding in this respect was based upon its thorough consideration of the language of the notice itself, the particular circumstances of its publication, other contemporaneous FEA orders, and the general conditions giving rise to its publication.* In view of this essentially factual determination, TECA concluded that the notice satisfied, as a matter of law, the requirements of Section 4.

The Court's conclusion in this respect is consistent with the decisions of other courts which have considered the proper construction of this provision of the APA. *Logansport Broadcasting Corp. v. United States*, 210 F.2d 24 (D.C. Cir. 1954), *Owensboro on the Air, Inc. v. United States*, 262 F.2d 702 (D.C. Cir. 1958).

Petitioners asked the courts below to rule that adequate notice of agency rulemaking must describe with particularily the substance of the rule eventually

*As petitioners point out, the District Court had concluded that the published notice did not by its terms refer to Shell Puerto Rico since it was subsequently found not to be a "subsidiary of a refiner". TECA held otherwise, noting that "the preclusion seen by the trial court in the notice by technically relating the refiner definition from another context is not there either from a technical standpoint or by reasonable intendment". (Pet. App. 66a-67a.)

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adopted. But as the court noted in *International Harvester Co. v. Ruckelshaus*, 155 U.S. App. D.C. 411 478 F.2d 615, 632 n.51 (1973), under such a rule an agency could adjust its position in response to the submissions of interested parties only at the risk of having to begin all over again by publishing the exact rule it has decided to adopt. The APA should not be interpreted to require such an absurd result. See *South Terminal Corp. v. Environmental Protection Agency*, 504 F.2d 646 (1st Cir. 1974).

The courts below concluded that petitioners had even received actual notice that FEA was considering, as one alternative, the precise solution eventually adopted in the May 20 regulation. This finding was based upon the courts' extensive consideration of events which took place at the hearings. The transcript of the hearings was held open in order to afford interested parties the opportunity to make additional written submissions.

Petitioners assert that they do not ask this Court to review this "essentially factual" finding (Pet. 14.). Rather, they ask this Court to determine whether actual notice is sufficient to remedy a deficiency in the published notice of agency rulemaking required by the APA. TECA expressly found that the published notice complied with the statutory requirements. Thus, the issue now raised by petitioners was not dispositive of this case, and it does not form a basis for this Court's review.

B. IMMEDIATE EFFECTIVENESS

Petitioners suggest that the May 20 regulation did not take immediate effect because it contained no express recitation of "good cause". The lower courts held otherwise. Thus, TECA, after an examination of

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the language of the order itself and the circumstances surrounding its publication, found that:

> [T]here obviously was good cause for the regulation to be made effective immediately, and by clear implication where the text of the Order and the related circumstances of record are looked to that was its intent. (Pet. App. 73a-74a.)

The lower courts further concluded that such an order complies with the requirements of the APA, regardless of the absence of the exact language which petitioners suggest the statute requires. It has consistently been held by courts confronted with this question that the APA does not require agencies to parrot the specific language of Section 4. *California v. Simon*, 504 F.2d 430 (T.E.C.A.), *cert. denied*, 419 U.S. 1021 (1974); *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321 (T.E.C.A.), *cert. denied*, 419 U.S. 896 (1974); *Hoving Corp. v. FTC*, 290 F.2d 803 (2nd Cir. 1961).

A contrary rule would exalt form over substance. Both courts concluded that the petitioners were not prejudiced by the agency's failure to include the words "good cause" in the text of the May 20 order. "Good cause" plainly existed. The March 20 order had been, for "good cause", made effective immediately. Petitioners had no reason to suppose that good cause no longer existed on May 20, or that circumstances had arisen which would justify a thirty-day gap in the application of the refiner rule in Puerto Rico.

Further, TECA noted that petitioners themselves treated the provisions of the regulation which benefited them as being immediately effective. (Pet. App. 74a-75a.) Presumably petitioners did not consider that the remaining provisions of the order were to become effective 30 days later. Under these circumstances, this Court should

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have no doubt that the courts below properly concluded that the order complied with the requirements of the APA.

C. JUDICIAL REVIEW

Both courts below found that the regulation in question was a rational response to the problems at hand, intended to fulfill the agency's statutory responsibilities. Under the decisions of this Court, this finding precluded further review by the courts below. *Bowman Transp., Inc. v. Arkansas-Best Freight Sys.*, 419 U.S. 281 (1974); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

It is evident from the opinions of the courts below that each inquired extensively into the circumstances which gave rise to the regulation, including those circumstances which compelled the FEA to single out Shell Puerto Rico for what petitioners characterize as "special treatment". (Pet. App. 27a-41a, 53a-61a.) There is nothing in the record which suggests, as petitioners assert, that the courts below "relied entirely upon administrative expertise" in reaching their decisions.

Petitioners cannot suggest that the courts below failed to give their full attention to the facts and circumstances which give rise to the FEA's action. Their real complaint is that the courts below, following the decisions of this Court, refused to substitute their judgment for that of the FEA. Having failed in their effort in the lower courts, petitioners now invite this Court to judge the wisdom of the agency's action. Respondent respectfully suggests that, in accordance

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with well-established precedent, this Court decline the invitation.

II.

NO CONFLICT OR CONFUSION EXISTS AS TO THE PRINCIPLES OF LAW APPLIED BY THE COURTS BELOW.

The courts below decided this case on the basis of principles of law consistently applied by other courts which have decided similar questions, including this Court and the Courts of Appeals. Petitioners are unable to advise this Court of any decisions applying conflicting principles of law. Instead, they employ a rhetorical device which implies the existence of conflicts where none exist in fact

Petitioners suggest, for example, that the decisions below are "inconsistent with the philosophy behind" *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973). In that case, this Court emphasized the importance of fair notice and opportunity to comment, as did the courts below in this case. In essence petitioners' suggestion is that since the courts found adequate notice on the facts in this case, they abandoned the whole philosophy of adequacy of notice.

Similarly, petitioners assert that the courts below ignored the policy of Section 4 of the APA, unlike the courts in *National Ass'n of Independent Television Producers and Distrib. v. FCC*, 502 F.2d 249 (2nd Cir. 1974) and *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692 (D.C. Cir. 1974). Those cases did not involve the issue of what an agency must do to make a regulation effective immediately. They have no bearing on this case.

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Finally petitioners suggest that since TECA found FEA's actions in this case to be rational, it must have abdicated its judicial review function, or at least, subjected FEA to "a different and less exacting standard" of review. (Pet. 19.) Having postulated that a less-exacting standard was applied, petitioners argue that no conflict can arise on the issue whether FEA should be held to a lesser standard because TECA is the only appellate court which reviews FEA actions.

The creativity of this argument fails to compensate for its lack of substance. No conflict exists between the decisions of TECA and those of other courts of appeals. But that is true not because review of FEA actions is confined to TECA. Rather, there is no conflict because TECA applied the standards of review regularly applied by this Court and the Courts of Appeals to the FEA action in question. It never held FEA to a lesser standard.

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CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

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39 Fed. Reg. 17764	10
39 Fed. Reg. 17765	10, 11
39 Fed. Reg. 36320-36322	11
Miscellaneous:	
Executive Order No. 11748, 38 Fed. Reg. 33575	6

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1503

TEXACO, INC., ET AL., PETITIONERS

v.

FEDERAL ENERGY ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals (Pet. App. 52a–75a) is not yet reported. The opinion of the district court (Pet. App. 15a–45a) is reported at 398 F. Supp. 865.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals (Pet. App. 76a) was entered on February 9, 1976, and a timely petition for rehearing (Pet. App. 77a) was denied on March 18, 1976. The petition for a writ of certiorari was filed on April 16,

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1976. The jurisdiction of this Court is invoked under Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 87 Stat. 633, 15 U.S.C. (Supp. IV) 754(a)(1), which incorporates by reference Section 211(g) of the Economic Stabilization Act of 1970, 84 Stat. 799, as amended, 12 U.S.C. (Supp. IV) 1904 note, and 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were afforded adequate notice of the subjects and issues involved in a rulemaking proceeding conducted by the Federal Energy Administration.

2. Whether the regulation issued at the conclusion of that rulemaking was effective immediately or 30 days after its publication in the Federal Register.

3. Whether the Federal Energy Administration acted arbitrarily and capriciously in adopting the regulation.

STATUTES AND REGULATIONS INVOLVED

With the exceptions noted below, the relevant statutes are set forth at Pet. 3–4.

Section 3 of the Emergency Petroleum Allocation Act of 1973, 87 Stat. 627, 15 U.S.C. (Supp. IV) 752, provides:

> For purposes of this chapter:
>
> * * * * *
>
> (7) The term "United States" when used in the geographic sense means the States, the Dis-

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trict of Columbia, Puerto Rico, and the territories and possessions of the United States.

Section 4 of that Act, 15 U.S.C. (Supp. IV) 753, provides:

> (a) [T]he president shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation. * * *
>
> (b)(1) The regulation under subsection (a) of this section, to the maximum extent practicable, shall provide for—
>
> * * * * * *
>
> (D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers and branded independent marketers;
>
> (F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;
>
> * * * * * *

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

The relevant regulations are set forth at Pet. App. 1a–14a.

STATEMENT

The Commonwealth of Puerto Rico is almost totally dependent upon petroleum imported from foreign countries for its energy needs (Pet. App. 16a–17a, 56a). With the world-wide shortages of oil caused by the Arab oil embargo, the cost of foreign petroleum increased from approximately $3 in 1973 to over $14 per barrel in early 1974 (Pet. App. 56a). This precipitous price rise threatened substantial disruption of the island's fragile economy, much of whose industrial sector had developed during a period when foreign petroleum was relatively inexpensive (Pet. App. 16a–17a).

In response to the nationwide petroleum shortages caused in part by inadequate domestic production and the oil embargo, in the fall of 1973 Congress enacted the Emergency Petroleum Allocation Act of 1973 (the "Allocation Act"), 87 Stat. 627, 15 U.S.C. (Supp. IV) 751 *et seq.* Section 4(a) of the Allocation Act, 15 U.S.C. (Supp. IV) 753(a), required that the President promulgate regulations "providing for the mandatory allocation of * * * each refined petroleum product in amounts * * * and at prices specified in * * * such regulation[s]." Section 4(b)(1) of the Act, 15 U.S.C. (Supp. IV) 753(b)(1), provides that

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these regulations must provide for the following statutory objectives, to the maximum extent practicable:

> (D) preservation of an economically sound and competitive petroleum industry; * * * and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;
>
> * * * * *
>
> (F) equitable distribution of * * * refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry,* * *.
>
> * * * * *
>
> (I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

The Allocation Act applies to both the United States and the Commonwealth of Puerto Rico. Section 3(7), 15 U.S.C. (Supp. IV) 752(7).

Section 4(b)(2)(A) of the Act, 15 U.S.C. (Supp. IV) 753(b)(2)(A), required that in specifying the price of petroleum products, the regulations provide "a dollar-for-dollar passthrough of net increases in the cost of * * * refined petroleum products to all marketers or distributors at the retail level." The Federal Energy Administration ("F.E.A."), to which the President delegated his authority to issue regulations, adopted two general pricing rules that distinguished

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between "refiners" and "resellers" in order to control the maximum price those firms might charge for their products and provide a dollar-for-dollar pass through of their increased raw materials cost.[1]

"Refiners" are required to pool their costs of acquiring crude oil and other costs of production and spread them over the production of all their domestic refineries in determining their allowable ceiling price for any petroleum product. 10 C.F.R. Part 212, Subpart E. "Resellers" are allowed to pass through directly to their customers any increases in petroleum costs. *Id.*, at Subpart F. Prior to the promulgation of the regulation petitioners challenge, the term "reseller" included in Puerto Rico, as elsewhere, any entity of a refiner engaged in the business of purchasing and reselling petroleum products which purchased less than 5 percent of such products from its parent refiner and which "historically and consistently exercised the exclusive price authority with respect to sales by the entity." 10 C.F.R. 212.91.

There are two main refiners of crude oil in Puerto Rico—Caribbean Gulf Refining Corporation, a subsidiary of a domestic refiner, the Gulf Oil Corporation, and Commonwealth Oil Refining Company

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[1] The rules originally were adopted by the Federal Energy Office ("F.E.O."), to which the President had delegated his authority under the Allocation Act. Executive Order No. 11748, 38 Fed. Reg. 33575. F.E.O. became the Federal Energy Administration ("F.E.A.") pursuant to the Federal Energy Administration Act of 1974, Pub. L. 93–275, 88 Stat. 97, 15 U.S.C. (Supp. IV) 761 *et seq.*

("CORCO"), which operates its only refinery in Puerto Rico and has no external distribution system (Pet. App. 19a, 55a). Under the refiner regulation, Caribbean Gulf, which sells approximately 25 percent of Puerto Rico's refined petroleum products, was required to average its petroleum costs with the product costs of its parent. However, CORCO, which sells approximately 75 percent of the island's refined petroleum, was permitted to pass through its increased raw materials costs directly to Puerto Rican wholesalers (Pet. App. 55a). Since price controls had held the price of domestic crude oil to approximately $5.50 per barrel, while the uncontrolled world oil price had increased to $14 per barrel, Caribbean Gulf was required to sell its refined products at a considerably lower price than CORCO (Pet. App. 20a, 57a–58a).

Certain wholly-owned subsidiaries of domestic refiners, including petitioners Texaco Puerto Rico, Inc., Mobil Oil Caribe, Inc., and Esso Standard Oil S.A. Ltd., marketed petroleum products in Puerto Rico. These subsidiaries purchased virtually all their petroleum products from CORCO and historically and consistently had exercised exclusive pricing authority. Therefore, since these firms qualified as "resellers" under the F.E.A. regulation, prior to March 20, 1974, they were permitted to pass through directly to their customers any increases in petroleum prices charged by CORCO (Pet. App. 19a–20a, 55a–56a).

Another major Puerto Rican marketer, the Shell Company (Puerto Rico) Ltd., also purchased refined

petroleum from CORCO and was subject to the "reseller" rule. Unlike the other major marketers, Shell (P.R.) has no domestic parent refiner but is 99.9 percent owned by The Shell Petroleum Company Limited, a United Kingdom company (Pet. App. 20a, 56a). Although that company and The Shell Oil Company, a Delaware corporation, are under the common control of two parent companies, Shell (U.S.) has no interest in Shell (P.R.) (Pet. App. 20a, 32a–35a, 56a).

Thus, under the original F.E.A. regulation of January 15, 1974, both CORCO and these four major marketers, which together controlled between 73 and 78 percent of the Puerto Rican retail petroleum market (Pet. App. 20a), were authorized to pass through any increase in product costs to the consumer.

2. Because of its total dependence upon high-priced foreign oil, Puerto Rico faced a substantially greater increase in petroleum costs than the mainland United States. On February 1, 1974, CORCO increased the price of refined gasoline sold to all its customers, including the petitioner marketing subsidiaries and Shell (P.R.), by approximately 17 cents per gallon (Pet. App. 57a). F.E.A. regulations prevented Caribbean Gulf from posting a comparable price increase. Therefore, to the extent that CORCO's customers attempted to pass through these increased costs, a two-tiered pricing structure emerged. Widespread disruption of the island's economy ensued, including a two-day shutdown of retail gasoline stations and a major transportation strike (Pet. App. 21a, 57a).

On March 20, 1974, F.E.A. announced an interim amendment to its mandatory petroleum price regulations by which Puerto Rican subsidiaries of domestic refiners would be subject to the refiner rule, rather than the reseller rule, until it was determined whether such treatment was appropriate on a permanent basis. 39 Fed. Reg. 10434. F.E.A. determined that there was good cause to make the amendment effective immediately (*ibid.*).

At the same time, it published a notice of proposed rulemaking and public hearing to determine whether Puerto Rican marketers "owned or controlled by refiners should be subject to the price regulations applicable to refiners, * * * resellers, or to some other form of price regulation." 39 Fed. Reg. 10454. Concurrently, F.E.A. issued a separate order to Shell (P.R.) requiring it to adhere to its February 22, 1974, price levels pending the conclusion of the rulemaking proceedings (Pet. App. 22a, 58a).

Representatives of all the petitioner marketing subsidiaries attended the public hearings (Pet. App. 68a–69a & n. 18). The special problem of Shell (P.R.) was fully explored at the hearings, and a proposal similar to that ultimately adopted was discussed (Pet. App. 68a, 71a). Representatives of the subsidiaries were afforded full opportunity to comment on the problem and were questioned on this subject by the presiding F.E.A. official (Pet. App. 68a–71a).

On May 20, 1974, F.E.A. published its final mandatory petroleum price regulation for Puerto Rico (issued May 16, 1974), which provided that all entities of mainland United States refiners that operated on the island would be treated permanently as "refiners." 39 Fed. Reg. 17764. It stated (*id.* at 17765):

> [F.E.A.] has concluded that the refiner price rule should be applied in Puerto Rico. The foremost consideration in this regard is the adverse impact that the reseller rule would have on the economy of Puerto Rico. * * * [T]he need to maintain "equitable" prices for petroleum products in Puerto Rico is particularly acute in view of the nature of the Puerto Rican economy.

F.E.A. found that Shell (P.R.) was not owned directly or indirectly by a domestic refiner and therefore must be treated as a "reseller" under the price regulations, which would permit it to pass through its increased product costs. 39 Fed. Reg. 17765. However, F.E.A. recognized that while treating Shell (P.R.) as a reseller and the other subsidiaries as refiners might make the price of petroleum on the mainland and on the island more comparable, that adjustment alone would not eliminate the potential for disruption of the Puerto Rican economy. If one major marketer had posted substantially higher product prices than the other firms, the two-tier pricing structure, with its attendant risks of chaos and economic dislocation, would have been recreated.

Therefore, F.E.A. established a mechanism to equalize the retail prices charged by the various marketers,

while still allowing CORCO and Shell (P.R.) to pass through their increased costs (39 Fed. Reg. 17765):

> [F.E.A.] has determined that it is necessary to require CORCO to adjust its prices to Shell (Puerto Rico) downward, and to permit CORCO to make an upward adjustment in the prices it charges to its other customers, so that [CORCO] will continue to obtain a dollar-for-dollar pass through of its increased product cost.

Thus, the petroleum costs of other CORCO customers were adjusted upward to compensate the refiner for price concessions necessary to bring Shell (P.R.)'s maximum allowable prices into line with that of its competitors. Under the "refiner" regulation, the marketing subsidiaries and their domestic parents could factor these increased costs into their composite system crude oil costs and pass this increment through to their customers on the mainland and in Puerto Rico.

With the renewed availability of adequate petroleum supplies after the lifting of the oil embargo, F.E.A. subsequently determined that removal of the Shell (P.R.) price adjustment would not produce as great an adverse effect on the Puerto Rican economy as it would have in May 1974. Therefore, after receiving assurances from Shell (P.R.) that it would not attempt to pass through all its increased costs, effective October 1, 1974, F.E.A. amended its regulations to eliminate the requirement that CORCO adjust its prices in this fashion. 39 Fed. Reg. 36320–36322.

3. Petitioners Esso Standard Oil S.A., Mobil Caribe, and Texaco Puerto Rico, and their respective domestic parents, instituted separate actions for declaratory and injunctive relief in the United States District Court for the District of Columbia attacking, on procedural and substantive grounds, the May 20, 1974, regulation insofar as it required them to compensate CORCO for its price reduction to Shell (P.R.).[2] The district court considered the cases together and granted summary judgment for the defendants and money judgments for CORCO on its counterclaims and those brought on its behalf by the United States.

The court held that petitioners had had "actual notice of the subjects and issues involved" in the rulemaking proceeding (Pet. App. 43a) and that, while the May 20, 1974 regulation did not contain an explicit finding of good cause to make it effective immediately, the need for immediate effectiveness was "obvious" from the findings in the regulation itself, which by its terms "required immediate effectiveness" (Pet. App. 44a). It also found that a rational basis existed for the Shell (P.R.) pricing provision in the regulation and that its adoption was "within the broad regulatory authority conferred upon the agency" (Pet. App. 40a).

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[2] CORCO was allowed to intervene in each suit. The United States also was allowed to intervene for the sole purpose of asserting a counterclaim that the oil companies be ordered to pay the sums due CORCO. The Commonwealth of Puerto Rico intervened only in the suit commenced by Mobil Caribe (Pet. App. 26a).

The Temporary Emergency Court of Appeals affirmed (Pet. App. 52a–75a). It found that petitioners had "received fair and reasonable advance notice of the subjects and issues finally covered by the regulation" and "were afforded fair and reasonable opportunity for comment and the submission of data in substantial compliance" with the requirements of the Administrative Procedure Act ("APA") (Pet. App. 73a). It affirmed the district court's findings that "there was obviously good cause for the regulation to be made effective immediately," and that "by clear implication * * * that was its intent" (Pet. App. 73a–74a). Finally, it held that F.E.A.'s solution to the Shell (P.R.) problem was "a rational response * * * which took into consideration the statutory responsibilities of the agency" and was not arbitrary or capricious (Pet. App. 64a–65a).

ARGUMENT

Petitioners challenge, on procedural and substantive grounds, a short-lived F.E.A. regulation, no longer in effect, addressed to a nonrecurrent problem affecting a minute segment of the petroleum industry. Petitioners do not challenge the constitutionality of the regulation or the statutory authority of the agency to promulgate it, but simply contend that the regulation was procedurally infirm and arbitrary and capricious. The petition presents no issues of either general or prospective significance. Furthermore, applying well established principles, the Temporary Emergency

Court of Appeals correctly concluded that F.E.A. followed proper procedures in adopting this rule and that the regulation was not arbitrary or capricious. Further review is not warranted.

1. Petitioners contend (Pet. 11) that the notice of rulemaking and public hearings published on March 20, 1974, did not afford adequate notice that Shell (P.R.) would be exempted from the "refiner" rule or that the price differential on CORCO's sales to Shell would be established.

Section 5(b) of the APA, 60 Stat. 239, as amended, 5 U.S.C. 553(b), provides that general notice of proposed rulemaking shall be published in the Federal Register and shall include "either the terms or substance of the proposed rule or a description of the subjects and isues involved." But that provision does not require advance publication of each precise proposal the agency ultimately may adopt as a regulation, and obviously does not bar an agency from changing its proposal as the result of the factual submissions and comments it receives. See *California Citizens Band Assn.* v. *United States*, 375 F. 2d 43, 48 (C.A. 9), certiorari denied, 389 U.S. 844. As the Temporary Emergency Court noted (Pet. App. 67a), the degree of specificity petitioners suggest was mandatory is not required and could not have been provided at the time notice was given.

The purpose of rulemaking is to give affected persons the opportunity to inform the agency of their

views and to permit the agency to obtain those views and thereby to make the agency procedures flexible and responsive to the needs to be met. Petitioners' argument that the notice must specify the precise details of the regulations ultimately adopted would defeat those objectives.

The notice of rulemaking stated in part (39 Fed. Reg. 10454):

> Notice is hereby given that [F.E.A.] will receive written comments and hold a public hearing in San Juan, Puerto Rico, with respect to whether certain entities operating in Puerto Rico which are owned or controlled by refiners should be subject to the price regulations applicable to refiners, to the price regulations applicable to resellers, or to some other form of price regulation.

The notice expressly stated that the major concern of the proceeding would be the potential effects upon the Puerto Rican economy if purchasers from CORCO were treated as resellers and the retail prices of their products allowed to reflect the high price of foreign crude oil (*id.* at 10454–10455). It also directed interested parties to address, *inter alia,* "the place in the overall corporate structure of the refiner which is occupied by the Puerto Rican entity" and "the effects of any proposed rule on prices in Puerto Rico, * * * on the overall market structure in Puerto Rico, [and] on the entities operating in Puerto Rico" (*id.* at 10455).

As the court below properly concluded (Pet. App. 66a–67a), under any reasonable interpretation of the notice, the contemporaneous price-freeze order F.E.A. issued to Shell (P.R.), and the circumstances surrounding the initiation of this proceeding, petitioners received fair and adequate notice that among the subjects and issues to be considered in the rulemaking would be the appropriate form of price control for the operations of Shell (P.R.). The precise pricing regulation ultimately adopted reflected and implemented the original description of the goals of the rulemaking and were foreshadowed by the proposals, questions and comments received during the proceeding. See *South Terminal Corp.* v. *Environmental Protection Agency,* 504 F. 2d 646, 658 (C.A. 1).

Since the published notice was adequate, there is no occasion to consider the alternative holding of the Temporary Emergency Court that any arguable deficiency in the notice was cured by petitioners' receiving actual notice [3] of a proposed version of the regula-

[3] Although not named in the published notice of rulemaking, petitioners received fair notice of F.E.A.'s proposed treatment of Shell (P.R.) during the proceedings, were questioned about it at the hearings, and were afforded an adequate opportunity to submit written comments on that proposal (Pet. App. 67a, 73a). See *United States* v. *Florida East Coast R. Co.*, 410 U.S. 224, 241, 243–244.

Rodway v. *United States Department of Agriculture*, 514 F. 2d 809 (C.A. D.C.), on which petitioners rely (Pet. 14), established that "[a]bsent actual notice, the public should be held accountable only for notice plainly set forth" in the Federal Register. 514 F. 2d at 815. But in this case, since the published notice was adequate and the affected firms had actual notice of F.E.A.'s proposal, that decision is irrelevant.

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tion F.E.A. finally adopted (Pet. App. 68a–73a).[4] Moreover, the procedures F.E.A. followed were in substantial compliance with the APA, and any technical variations, which did not prejudice petitioners, afford no ground for relief. See *California* v. *Simon*, 504 F. 2d 430, 440 (T.E.C.A.), certiorari denied, 419 U.S. 1021; *Nader* v. *Sawhill*, 514 F. 2d 1064 (T.E.C.A.).[5]

2. Petitioners contend (Pet. 16) that the May 20, 1974 regulation did not become effective until at least 30 days after its publication in the Federal Register. But the question whether this particular regulation became effective immediately upon publication in the Federal Register or not until 30 days thereafter is not an issue requiring resolution by this Court.

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[4] The petitioner parent refiners apparently challenge (Pet. 15) the holding of the court below that they had actual notice of the subjects and issues of the rulemaking (Pet. App. 68a–69a). However, this inherently factual issue does not warrant review by this Court. Moreover, the question whether the subsidiaries "represented" their parents at the public hearings is irrelevant, for the persons actually affected by the rulemaking—the marketing subsidiaries—do not challenge (Pet. 14) the lower courts, finding that they received actual notice. The parent refiners were brought into this litigation only by F.E.A.'s issuance of remedial orders against them for nonpayment of the CORCO invoices, which, under F.E.A. regulations, can be brought against both the parent and the subsidiary, although only the subsidiary dealt directly with CORCO (Pet. App. 25a n. 1).

[5] In any event, the Temporary Emergency Court of Appeals is a court of limited jurisdiction. Contrary to petitioners' assertion (Pet. 10–11), its resolution of these procedural questions is unlikely to have great impact on the other courts of appeals.

If, as petitioners suggest (Pet. 10), federal agencies are abusing the notice and comment provisions of Section 4 of the APA, the courts of appeals which review those actions are the appropriate forums to correct that condition.

Section 5(d) of the APA, 5 U.S.C. 553(d), provides that the required publication of a substantive regulation shall be made not less than 30 days before its effective date, except "as otherwise provided by the agency for good cause found and published with the rule." Both lower courts correctly found that the findings published with the instant regulation demonstrated good cause for its immediate effectiveness and that, although not expressly so stating, its terms obviously required immediate effectiveness (Pet. App. 44a, 73a–74a).

The March 20, 1974 "reseller" regulation had been made effective immediately in view of the existing disruption of the island's economy. The concurrent notice of rulemaking expressly informed all interested parties that the proceeding would be given "expedited treatment" (39 Fed. Reg. 10455). The discussion at the public hearings and the findings in the May 20, 1974 regulation demonstrated the "continuing urgency" of preserving the existing pricing structure and the need for making its permanent extension effective immediately (Pet. App. 74a). Moreover, from the text of the regulation, the base pricing formulas it established, and the circumstances surrounding its adoption, it is evident that the regulation was intended to be effective immediately (*ibid.*).

Therefore, the courts below correctly held that there was substantial compliance with Section 553; the violation, if any, was the technical one of not stating explicitly that which was implicit. See *Nader* v. *Saw-*

hill, supra, 514 F. 2d at 1068–1069; *De Rieux* v. *The Five Smiths, Inc.*, 499 F. 2d 1321 (T.E.C.A.), certiorari denied, 419 U.S. 896; *California* v. *Simon, supra*.

3. Petitioners further contend (Pet. 18) that the Temporary Emergency Court of Appeals erroneously afforded "extreme deference" to the regulation and subjected it to "a different and less exacting standard" of review than that normally governing administrative regulations in concluding that it was not arbitrary or capricious. To the contrary, the court carefully exercised its reviewing function in concluding that F.E.A.'s action was a "rational response" to the pricing problem to which, under well-settled principles, the courts will defer (Pet. App. 64a). See *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285–286; *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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TEXACO INC., TEXACO PUERTO RICO, INC., MOBIL OIL CORPORATION, MOBIL OIL CARIBE, INC., EXXON CORPORATION and ESSO STANDARD OIL S.A., LTD.,
Petitioners,

v.

FEDERAL ENERGY ADMINISTRATION and FRANK G. ZARB, Administrator, Federal Energy Administration,
Respondents,

UNITED STATES OF AMERICA, COMMONWEALTH OIL REFINING COMPANY and COMMONWEALTH OF PUERTO RICO,
Intervenor-Respondents.

PETITIONERS' REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

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Intervenor-Respondents.

PETITIONERS' REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

The petitioners, Mobil Oil Corporation, Mobil Oil Caribe, Inc., Exxon Corporation, Esso Standard Oil S.A., Ltd., Texaco Inc. and Texaco Puerto Rico, Inc., respectfully submit this brief in reply to arguments raised in the briefs of respondents Federal Energy Administration and Frank G.

Zarb, and intervenor-respondents United States of America, Commonwealth Oil Refining Company ("CORCO") and Commonwealth of Puerto Rico in opposition to the grant of a writ of certiorari in this case.

I

Published Notice Was Inadequate

The purpose of Section 4(b) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(b)(3), is, petitioners submit, to provide for formal advance notice which will give fair warning to interested parties of proposed regulatory action which may adversely affect their interests. Therefore, the issue addressed in our Petition is whether the formal notice gave fair warning or indeed any warning at all of anything even remotely resembling the Shell subsidy order, which, if it was a price regulation, regulated to the detriment of petitioners the prices not of petitioners and other like "entities" referred to in the notice but rather of their supplier, CORCO, a refiner and already subject to the refiner rule; that CORCO was not an "entity" of a "firm" operating on the mainland was, as CORCO recognizes, the very reason that the Federal Energy Administration ("FEA") initially felt compelled to deal specially with the Puerto Rican petroleum market. (CORCO Brief at 4.)

II

The "Actual Notice" Exception Does Not Apply

The "actual notice" exception in Section 4(b) of the APA applies only in cases where there are named parties; this is not only the plain language of the statute but was clearly held by the Court of Appeals for the District of Columbia

Circuit in *Rodway* v. *United States Department of Agriculture,* 514 F.2d 809 (D.C. Cir. 1975). The fact that the Court in *Rodway* went on to find that there had been no actual notice either, and in that context used the language quoted in the Federal Respondents' Brief in Opposition (at 16, note 3) in no way detracts from the force of that primary holding.

III

FEA Did Not Comply With The Requirements For Immediate Effectiveness

The "substantial compliance" cases relied on by the Temporary Emergency Court of Appeals in support of its decision as to thirty-day effectiveness, and by the Federal Respondents in their brief, are in no way comparable to the present case. In *Nader* v. *Sawhill,* 514 F.2d 1064 (T.E.C.A. 1975), the agency *did* provide for immediate effectiveness and did in terms find good cause therefor, albeit in conclusory terms. And even in *California* v. *Simon,* 504 F.2d 430 (T.E.C.A.), *cert. denied,* 419 U.S. 1021 (1974), there was at least provision for immediate effectiveness, from which a finding of good cause might conceivably be inferred.[1] In this case, on the other hand, there was complete and utter non-compliance, so far as the action of FEA is concerned. It does not appear that FEA gave any consideration whatever to Section 4(c) of the APA, 5 U.S.C. § 533(d), or to its requirement that good cause be found for immediate effectiveness. Nor, petitioners submit, can it reasonably be concluded, as the Federal Respondents urge and the Temporary Emergency Court of Appeals intimated in its opinion, that a decision by the agency not to put the Shell subsidy into effect immediately would necessarily

1. Much the same could be said of De Rieux v. Five Smiths, Inc., 499 F.2d 1321 (T.E.C.A.), *cert. denied,* 419 U.S. 896 (1974), to the extent that it bears on the present issue.

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have been irrational. Rather, it is perfectly obvious that the interim regulations in effect between March 20 and May 20, which eliminated the threat of a two-tiered system, but which did not impose the Shell subsidy, could have remained in effect for thirty more days.

IV

"Corporate Control" and "Preservation of Competition" Arguments do not Justify the Extraordinary Subsidy Awarded Shell at Petitioners' Expense

Respondents are at great pains to emphasize the brief existence of the subsidy to Shell (Puerto Rico) and its non-recurring nature. (*E.g.*, Federal Respondents' Brief at 13.) By inference, this stands as a reason for excusing non-compliance with the requirements of notice. However, it is precisely the *sui generis* character of the subsidy to Shell (Puerto Rico) which at once highlights the necessity of adherence to the requirements of proper notice and stands as telling evidence that such notice was lacking. Petitioners submit that such an extraordinary imposition would not have gone without comment had they been fully apprised of FEA's intentions. Further, the arguments advanced by respondents to support the Shell subsidy decision only serve to demonstrate its irrationality.

The fact that Shell as a firm (*i.e.*, the Royal Dutch/Shell group) is controlled from abroad whereas control of petitioners and others of Shell's competitors is lodged in the United States is in itself no reason why Shell should be singled out for special and preferential treatment where regulation of business and activities carried on in the United States is involved. This has, of course, long been recognized by FEA, by its predecessor the Federal Energy Office, and by the Cost of Living Council under the Economic Stabilization Act of 1970, so far as operations within

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the United States proper are concerned. No reason beyond a bald *ipse dixit* has ever been suggested why any different principles should have been applied to operations in Puerto Rico, after it became a part of "the United States" for purposes of the regulatory system. See Section 3(7) of The Emergency Petroleum Allocation Act (the "Act"), 15 U.S.C. § 752(7) (Supp. 1976).

In its Brief in Opposition, Commonwealth of Puerto Rico suggests (at 8) that all the agency did was to limit ". . . exercise of its control over this most complex world-wide industry to those companies doing business in the United States." But every motorist has seen with his own eyes (and the record in this case makes it abundantly clear) that Shell as a "firm" (10 C.F.R. § 212.83(b)) does business in the United States, as well as in Puerto Rico, in precisely the same way as the petitioners and, except for this particular regulation, Shell's business in the United States is subject to the same rules, supposedly applied in the same way, as are the petitioners' like businesses in the United States. The only real difference between Shell and the petitioners would seem to be that in the case of Shell the principal United States components of the firm are not wholly-owned within the group whereas in the case of petitioners they are. But this has nothing whatever to do with the fact that the ultimate control of Shell is in foreign hands, and would seem, moreover, to be ruled out as a distinguishing factor by the very definition of "firm."

One other point must be made about the substantive issue, and that derives from the extraordinary—indeed unique—nature of the regulation itself.

The regulation imposing the Shell subsidy did three things:

First, by subjecting the petitioners Texaco Puerto Rico, Inc., Mobil Oil Caribe, Inc. and Esso Standard Oil S.A., Ltd.

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to the refiner rule it required them to sell the product they purchased from CORCO for less than they paid for it.

Second, to enable Shell, excepted from the application of the refiner rule, to continue to sell at a price competitive with petitioners and others in the market and still achieve its accustomed margin of profit, CORCO was directed to sell its product at a price sufficiently below the prices charged petitioners to provide the necessary spread and was authorized to pass through its unrecouped costs on product so sold to Shell to its other customers including petitioners.

Third, as subsequently interpreted by the agency and held by the district court below, the regulation impliedly nullified the existing contracts between CORCO and two of the petitioners (to the extent necessary to permit Shell's costs to be passed through to them), although the usual practice of FEA and of the Cost of Living Council before it had been not to set aside pre-existing contracts calling for a price lower than the ceiling price.

It is submitted that a regulation which creates such a competitive advantage where none had previously existed, in favor not of a small or independent refiner (for which the Act makes special provision), but rather in favor of what is probably world-wide the second largest of the "majors," and in Puerto Rico and the United States market generally a significant factor, which does so by imposing on CORCO a system of price discrimination, and which gives no hint of consideration of its possible anticompetitive effects—such a regulation, petitioners submit, urgently calls for and should only be upheld if supported by the most cogent justification. The conclusory statement in FEA's order promulgating the Shell subsidy (Petitioners' Appendix at 13a) strongly suggests that no consideration was given to these collateral consequences. Had notice been given in compliance with the statutory requirements, these consequences could and should have received full consideration.

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Conclusion

For the reasons set forth above and in the Petition, the writ of certiorari should be granted and the judgment of the Temporary Emergency Court of Appeals reversed.

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